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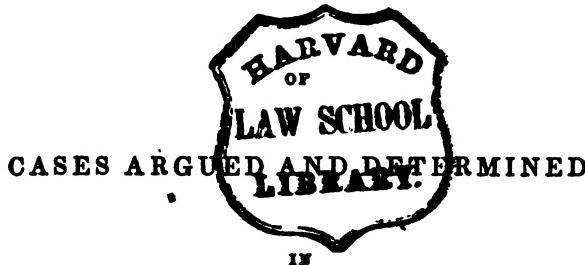
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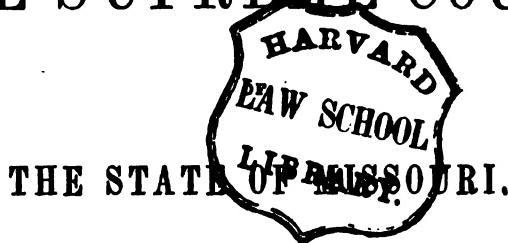
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REPORTS



IV

THE SUPREME COURT



HORATIO M. JONES,

1858 . . . REPORTED . . . 1858

VOL. XXV.

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1858.

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In the Clerk's office of the District Court of the Eastern District of Missouri.

Rec. Aug. 26. 1858

JUDGES OF THE SUPREME COURT OF THE STATE OF
MISSOURI.

HON. WILLIAM SCOTT,

HON. JOHN F. RYLAND,

HON. ABIEL LEONARD,

HON. WILLIAM B. NAPTON,

HON. JOHN C. RICHARDSON.

At the general election for judges, held August 8, 1857, the Hon. WILLIAM SCOTT, the Hon. WILLIAM B. NAPTON and the Hon. JOHN C. RICHARDSON were elected judges of the Supreme Court for the term of six years. They constitute the present Court.

E R R A T U M.

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ARGUED AND DETERMINED
IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI,

MARCH TERM, 1857, AT ST. LOUIS.

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PATTERSON *et al.*, Plaintiffs in Error, v. CAMDEN, Defendant
in Error.

1. In determining the meaning of a written instrument, the acts of the parties thereto are entitled to great weight.
2. Where a partnership is dissolved and a new partnership formed, the debts of the old firm may, by consent of all parties—the creditors, the old firm and the new—be transferred to the new firm, and the old firm may be discharged.

Error to St. Louis Circuit Court.

This was an action of assumpsit, commenced in the St. Louis Circuit Court in the year 1841. The declaration consisted of six counts, four of which charged the defendant, John B. Camden, as drawer of two bills of exchange, of which the following are copies:

“ Exchange for \$1639 35. Philadelphia, 24th October, 1839. Six months after date of this first of exchange, second
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of the same tenor and date unpaid, pay to the order of Robert Patterson & Co., sixteen hundred and thirty-nine thirty-five hundredths dollars, value received, and charge the same to account of your obedient servants. [Signed] T. T. Leavel & Co., in liquidation. To Messrs. T. T. & H. Leavel, New Orleans."

"Accepted, payable at the counting-house of Buckner, Stanton & Co., New Orleans. [Signed] T. T. & H. Leavel."

"Exchange for \$1706 05. Philadelphia, 28th January, 1840. Thirty-five days after date of this first of exchange, second of the same tenor and date unpaid, pay to the order of Robert Patterson & Co., seventeen hundred and six five-hundredths dollars, value received, and charge the same to account of [Signed] T. T. Leavel & Co., in liquidation. To Messrs. T. T. & H. Leavel, New Orleans."

"Accepted, payable at the banking-house of Forsyth & Limerick, New Orleans. [Signed] T. T. & H. Leavel."

There were also counts for goods sold, money had and received, &c., and upon an account stated. To the first four counts the defendant pleaded the general issue, set-off, and payment; he also pleaded that the sums sought to be recovered were for articles in a store account, and that the cause of action did not accrue within two years before the commencement of the suit.

At the trial evidence was given proving and tending to prove that prior to the 5th day of February, 1839, a firm existed in Manchester (afterwards called Yazoo city), in the state of Mississippi, composed of Thomas T. Leavel, John B. Camden, and Marbel Camden, under the name and style of T. T. Leavel & Co.; that Leavel was the acting partner, the Camdens residing in St. Louis; that during the period of the partnership the firm of T. T. Leavel & Co. had large transactions with the plaintiffs; that in January, 1839, the firm of T. T. Leavel & Co. ordered of plaintiffs brandy to the amount of \$1468 75, which was sent them, and the expenses of porterage and insurance on it paid by plaintiffs, amounting to \$44 50. On the 5th of February, 1839, the partnering

Patterson v. Camden.

ship of T. T. Leavel & Co. was dissolved, T. T. Leavel having bought out the interest of the Camdens for \$11,000, and the following notice was published in the paper published in Manchester, and also in the United States Gazette at Philadelphia: "Notice.—The partnership heretofore existing between the undersigned, under the name and style of T. T. Leavel & Co., is this day dissolved by mutual consent. Those having claims against the late firm will present them to T. T. & H. Leavel for settlement. Those indebted to them will make payment to the same. The name of the old firm may be used in the settlement of the old business. Manchester, Mississippi, February 5, 1839. [Signed] T. T. Leavel, Marbel Camden, John B. Camden, by his attorney, Marbel Camden." That immediately upon the dissolution of the firm of T. T. Leavel & Co. a new firm was formed of T. T. Leavel and his brother, under the style of T. T. & H. Leavel; that T. T. Leavel went to Philadelphia in March, 1839, when he met John B. Camden; and that while there, with the knowledge and approbation of said Camden, he drew drafts in settlement of the liabilities of the firm of T. T. Leavel & Co. to plaintiffs, in the name of "T. T. Leavel & Co. in liquidation;" that this was done in order to give the old firm time. Plaintiffs introduced evidence tending to prove that the draft for \$1636 35 was given for the brandy bought before the dissolution on the 15th of January, 1839, with interest and exchange added; and that the draft for \$1706 65 was given in settlement of another draft of \$1500, dated at Philadelphia March 8, 1839, and drawn by T. T. Leavel on T. T. & H. Leavel, in favor of J. B. and M. Camden, and endorsed by them, which was at its date delivered by T. T. Leavel and J. B. Camden to plaintiff, Robert Patterson, he at the time paying them the amount of the same in cash for the purpose of liquidating other liabilities of the firm of T. T. Leavel & Co. to other persons, which draft Robert Patterson at once transferred to plaintiffs; that T. T. Leavel had drawn in the name of "T. T. Leavel & Co., in liquidation," other drafts as well as the ones in suit, with the knowledge of defendant, and

Patterson v. Camden.

without objection ; as also that due notice was given of the presentment of the drafts and the non-payment thereof. Defendant introduced evidence tending to prove that Thomas T. Leavel, in 1838, visited St. Louis for the purpose of buying out the interest of the Camdens in the firm of T. T. Leavel & Co., and offered therefor \$15,000 ; that the firm of T. T. Leavel & Co. did not owe the plaintiff any thing ; also various receipts of plaintiffs for money paid by T. T. Leavel & Co. ; also a memorandum signed by T. T. Leavel, dated at Philadelphia, March 19, 1839, of endorsements by J. B. and M. Camden, of various drafts of T. T. & H. Leavel, which were given to settle up the old business of T. T. Leavel & Co.

The plaintiff asked the following instructions : " 1. If the jury find from the evidence that the plaintiffs were a mercantile firm, located and doing business in Philadelphia, and that the defendant was a member of the mercantile firm of T. T. Leavel & Co., located and doing business in another state, the state of Mississippi, and that the claim of the plaintiffs in this action originated in mercantile dealings between said two firms for merchandise sold and moneys advanced by plaintiffs to and for said T. T. Leavel & Co., and for their benefit, in dealing as merchants, then any balance due from said T. T. Leavel & Co. to plaintiffs, on said transactions, is not subject to the limitation of two years provided by law for articles in a store account ; nor is any portion of such balance, if any be due, which was for moneys advanced, included in the limitation of the act of assembly provided for upon accounts for goods, wares and merchandise sold and delivered. 2. If the jury find from the evidence that plaintiffs were a mercantile firm, and that T. T. Leavel & Co. were also a mercantile firm, composed of T. T. Leavel, Marbel Camden and John B. Camden ; that T. T. Leavel & Co. became indebted to said plaintiffs in mercantile transactions for merchandise sold before the dissolution of said firm of T. T. Leavel & Co. ; that the notice of dissolution read in evidence in this case was issued and published by authority of defendant ; that T. T. Leavel, by defendant's authority and consent, had charge of the business

Patterson v. Camden.

of T. T. Leavel & Co., and of the closing up and settling the same after its dissolution, and that in so closing up and settling the same he executed the drafts of \$1639 35 sued on, then such drafts bound said defendant as a drawer thereof. 3. If the jury believe from the evidence that the drafts sued on in this action and given in evidence by plaintiffs, or either of them, were drawn by the authority or consent of the defendant, they must consider him as originally bound as drawer of such draft, and such authority and consent may be either verbal or written, or implied from circumstances. 4. That knowledge by defendant, if proven, that T. T. Leavel & Co. drew drafts signed "T. T. Leavel & Co.," in liquidation," and delivered them to creditors of that firm on account or in liquidation of its debts, after its dissolution, without any manifestation of disapprobation on the part of defendant, is evidence tending to show an authority from him for their being so drawn. 5. That if the jury believe from the evidence that at the time of the dissolution of the firm of T. T. Leavel & Co. said firm was indebted to the plaintiffs on promissory notes, and that the drafts sued on in this action or either of them were given after the dissolution of said firm by T. T. Leavel for said indebtedness to the plaintiffs, and accepted by them in good faith, and that said T. T. Leavel was at that time authorized by the defendant to close up the business of said firm, they will consider the defendant as a drawer of such drafts and originally held as such. 6. But if the drafts sued on in this action were never binding on the defendant, and they or either of them were given for promissory notes of T. T. Leavel & Co. to plaintiffs, then the plaintiffs may recover on the original account or cause of action for which said notes were given under the money counts, and the notes are *prima facie* evidence of such consideration. 7. That if the jury believe from the evidence that the drafts sued on in this action, or either of them, were made in good faith by T. T. Leavel, in the name of T. T. Leavel & Co., in liquidation for a debt or debts due from T. T. Leavel & Co. before dissolution, and in the course of the settlement of the busi-

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ness of said firm were in good faith delivered to and received by the plaintiff, then, even if not binding as drafts on the defendant, they are evidence of an account stated in favor of the plaintiffs." The court thereupon gave the third instruction asked for, but refused to give the first, second, fourth, fifth, sixth and seventh instructions asked by plaintiffs.

The defendant asked the court to give to the jury the following instructions: "1. If the jury find that the two new bills of exchange mentioned in the declaration of the plaintiffs were drawn by T. T. Leavel after the dissolution of the firm of T. T. Leavel & Co., and after notice of such dissolution to the plaintiffs, and without authority from the defendant, then the plaintiffs are not entitled to recover in the present action upon the said bills of exchange. 2. The terms of the dissolution of the firm of T. T. Leavel & Co., as contained in the publication read in evidence, did not confer upon T. T. Leavel authority to draw the bills of exchange in question so as to bind the defendant. 3. If the jury find that the bills in question were drawn by T. T. Leavel, without authority from the defendant, after the dissolution of the firm of T. T. Leavel & Co., and notice thereof to plaintiffs, and were accepted by plaintiffs in payment of a pre-existing debt of T. T. Leavel & Co., then said debt was extinguished by the said bills, and the plaintiffs are not entitled to recover in the present action in respect to such pre-existing debts. 4. If the jury find that the plaintiffs, in January, 1829, were grocers, and then sold and delivered to the firm of T. T. Leavel & Co. a quantity of brandy and charged the same in account to said firm, then the plaintiffs were barred of their suit against the defendant to recover on the account for said brandy after the lapse of two years. 5. If the firm of T. T. Leavel & Co. was dissolved and an arrangement made by which the new firm of T. T. & H. Leavel took all the assets of the old firm and assumed the payment of all its debts, and if after notice of such dissolution and arrangement the plaintiffs took for their debt against the old firm the acceptance of the new firm on bills drawn by T. T. Leavel, then the plaintiffs are

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not entitled to recover of the defendant in respect to such debt. 6. If the old firm of T. T. Leavel & Co. was dissolved and the new firm of T. T. & H. Leavel constituted in its stead, consisting in part of different members, and receiving the assets and assuming the debts of the old firm, and the plaintiffs, being creditors of the old firm and knowing its dissolution and the arrangement by which the new firm had assumed its debts, gave an extension of time of payment to the new firm on the debt of the old firm by receiving time bills accepted by the new firm without the consent of the retiring members of the old firm, then the retiring members were discharged by such extension of time of the debt to the plaintiffs."

The foregoing six instructions moved by the defendant were given by the court. The jury found a verdict for the defendant.

Shepley, for plaintiff in error.

I. Upon the dissolution of a firm it is competent for the partners to agree that the name of the old firm may be used in the renewal of notes and drafts, or in the transaction of any business of the late partnership.

II. The notice of dissolution in this case was designed to give and does give power to use the name of the firm in renewing the maturing obligations of the firm. What is the old business about which the name of the firm is authorized to be used? The goods had all been sold. There were then but two things remaining—the debts due to the firm and the debts due by the firm. The power given had certainly no reference to the debts due to the firm for two reasons, 1st, because after dissolution either partner may receive and receipt for a debt due to the firm unless there is some prohibition the knowledge of which must be brought home to the debtors (*Story on Part.* § 473); 2d, because in the notice of dissolution it is stated that the new firm are entitled to receive payment of debts due the firm. The receipt of the new firm was then amply sufficient to discharge the debt due the

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old firm. The power then conferred was intended to operate only upon debts due by the firm. The debts of the old firm could be settled only by either paying them in cash or property, by giving the paper of the other people for them, or by renewing the paper or the debt. In payment the name of the old firm can not be used, nor can it be used in a settlement of the debts in any other way except in a renewal of the indebtedness. As it can only be used in the matter of renewals, it is not only a fair construction of the language that this power was intended to be given, but it is the necessary construction. (See Whitehead v. Bank of Pittsburg, 2 Watts & Serg. 172; 3 Watts & Serg. 347; Robinson v. Taylor, 4 Barr, 242; Brown v. Clark, 2 Harris, 468; Meyer v. Huggins, 1 Stroh. 473; Smith v. Winter, 4 Mees. & Wels. 454; Barton v. Isitt, 4 Barn. & Ald. 206.)

III. If the drafts sued on were, from want of power, never binding on defendant, then they were nullities, and as to the \$1639 35, the plaintiffs are remitted back to the promissory notes for which the draft was given. (Perrin v. Keene, 19 Maine, 355.)

IV. Even if the notes were never binding, yet, having been given by the settling partner, they are evidence of an account stated. (Motherson v. Rathbone, 11 Wend. 96; Draper v. Bissel, 3 McLean, 275; Davis v. Jesangue, 5 Whart. 530; Robinson v. Naylor, 5 Barr, 242; Luckie v. Forsyth, 3 Jones & Lat. 388.)

H. R. Gamble, for defendant in error, cited Story on Part. § 155, 156, 322; Long v. Story, 10 Mo. 637; Pope v. Risley, 23 Mo. 186; Bell v. Morrison, 1 Pet. S. C. 367; 1 McMul. 210; Humphries v. Chastain, 5 Georg. 166; National Bank v. Norton, 1 Hill, 572; Martin v. Kirk, 2 Hump. 529; 1 Smith (Ind.) 129; Sandford v. Mickle, 4 Johns. 224; 2 Dess. 43; Evans v. Drummond, 4 Esp. 89; Reed v. North, 5 Id. 122; Thompson v. Percival, 3 Nev. & Man. 167; Hast v. Alexander, 2 M. & W. 483; Isler v. Baker, 6 Humph. 85; Oakley v. Pasheller, 10 Bligh, 589.

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RYLAND, Judge, delivered the opinion of the court.

The record and proceedings in the court below show nothing which is relied on in this court for reversing the judgment until we come to the instructions asked and refused, as well as given and excepted to. The points then which have received our consideration arise on these instructions. It will be seen by the statement of the case that the court gave the third instruction asked for by the plaintiff and refused the others, and also that the court gave the six instructions asked for by the defendant.

Without minutely noticing each one of these instructions prayed for by the plaintiffs and refused, it is the opinion of this court that there is no error in refusing those not given; nor do we consider that the court erred in giving for the defendant the first, third and fourth instructions asked for by defendant. As to the second instruction we think it unnecessary to give any opinion in regard to the meaning of the words used by the parties in the notice of dissolution as they appear on the face of the instrument. We need not say what in law is the meaning of the terms employed in the notice, nor is it necessary for us to declare the meaning or extent of the power given by the notice considered as a mere instrument itself. The practical construction of the notice given by the parties themselves, or the acts of the parties in regard to the subject matter under the notice, may be properly looked to—properly taken into consideration, in order to ascertain what meaning the parties intended to attach to the instrument, and what power was intended by the partners to be used by T. T. Leavel. From all the acts done, and all the circumstances surrounding or attendant on the acts done, in regard to the dissolution and settling or winding up of the old firm, inferences may be drawn showing the meaning practically which the partners had when the notice was given, and what was their intention when the notice was thus drawn. This practical construction given by the parties themselves is a proper guide to its meaning, and is of more importance than

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what is the abstract meaning which this court may attach to its mere phraseology. (1 Stobb. 479.) "The business of a court and jury is to ascertain the meaning and intention of the parties in making an agreement, and to carry that into effect if it is consistent with law. I know of no better mode of ascertaining this meaning than is shown if all parties acted on a particular meaning." (2 Watts & Serg. 175.)

We consider that the fifth instruction is calculated to mislead the jury. The proposition of law contained in it we do not controvert, but we consider it not warranted by the facts of the case preserved in proof. The instruction is in these words: "If the firm of T. T. Leavel & Co. was dissolved and an arrangement made by which the new firm of T. T. & H. Leavel took all the assets of the old firm, and assumed the payment of all its debts, and after notice of such dissolution and arrangement *the plaintiffs took for their debt* against the old firm the acceptances of the new firm on bills drawn by T. T. Leavel, then the plaintiffs are not entitled to recover of the defendant in respect to such debt." This may well be so, but here the bills are drawn in the name of the old firm—T. T. Leavel & Co., in liquidation ; now, although T. T. Leavel may himself have drawn these bills, yet when the bills in the name of the firm of T. T. Leavel & Co., in liquidation, are received by the plaintiffs, we can not say but that they may have been so received in good faith, the plaintiffs really supposing that T. T. Leavel had the power to sign the same. Then this instruction may have misled the jury, the bill not being in the name of T. T. Leavel, but of T. T. Leavel & Co., in liquidation, yet made and drawn by T. T. Leavel. The plaintiffs may have thought that he had the power to use the name, and by receiving the bills in the name of the old firm they did not intend thereby to rely alone on the new and discharge the old. The expression "took the bills for their debt" is too loose. This may likewise have had a bad effect on the jury. (Story on Part. § 155 and note 2.) If the bills had been signed by T. T. Leavel alone, drawn by him in his own name on the new firm of T. T. & H. Leavel, and the

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plaintiffs had taken and accepted them in payment or satisfaction of the debt of T. T. Leavel & Co. to them, then the old firm may have been discharged from such debt ; and if the bills were drawn by T. T. Leavel, and he, without any authority, signed the name of the old firm to the bills, and this was known to the plaintiffs, and they accepted such bills in payment of the debt of the old firm, then the instruction might have been proper. But as it is, we consider it may have misled the jury to the plaintiffs' injury, and in this the court below committed error. The sixth instruction is improper for the same reasons as the fifth, and should not have been given. The doctrine of extension of time is not considered by us as properly arising on the bills as they have been drawn in the case, and therefore is not passed upon by the court.

So much for the points arising on the instructions. As the case has to go back, it may be well to refer to some general principles of law which may be considered applicable to a proper determination of the controversy. (Story on Contracts, § 244, 246 ; Story on Partnership, § 156, 328 ; 1 McMullan's Rep. 209 ; 1 Strob. 499.) "It is clear that the mutual agency of the partners which is created by the partnership ceases when it is dissolved, and that after dissolution neither can make a note or any other contract binding on the other partners unless he is authorized by them so to do. It is not necessary that this authority should be created by a special power of attorney or other instrument, but may be conferred by parol. The transactions of trade by their daily frequency and necessary promptness do not admit of formal and precise stipulations. Usage and custom of merchants to a great extent determine the import and effect of brief expressions ; and good faith, the necessary element of trade, must supply, from the character and objects of the agreement, the intention of the parties." (Myers v. Huggins & Stein, 1 Strobh. 477.)

There is no doubt that the law is well settled that if one partner goes out of a firm and another comes in, the debts of the old firm may, by consent of all three parties—the credi-

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tors, the old firm and the new—be transferred to the new. (Hart v. Alexander, 2 Mees & Wels. 484.) If in this case the Pattersons, after notice of dissolution of the firm of T. T. Leavel & Co., continued to deal with and extend credit to T. T. & H. Leavel, then they have no right to look to the old firm of T. T. Leavel & Co. for such indebtedness created after notice of the dissolution of the old firm; and if upon notice of the dissolution they afterwards accepted drafts drawn by T. T. Leavel, in the name of the old firm, on the new firm of T. T. & H. Leavel, for the indebtedness to them of the old firm, and from time to time continued to give credit to the new firm by a renewal of the drafts, they can not be afterwards allowed, upon the failure of the new firm, to call upon the old firm for payment, unless such drafts and such renewals were shown to be made with the consent of the old firm.

If upon the new trial it shall appear that the drafts in suit were for indebtedness created by the new firm after the plaintiffs knew that the old firm had dissolved partnership, then, unless these drafts were drawn by the consent and authority of the old firm, they can not be bound by it. Let the judgment below be reversed and the cause remanded for further trial; Judge Scott concurring; Judge Leonard absent.



THOMAS, Respondent, v. WYATT, Appellant.

25 24
107 624

1. A patent to a fictitious person is a nullity.

25 24
144 299
74a 354

25 24
145 628

Appeal from St. Louis Land Court.

S. Reber and T. J. Beirne, for appellant.

I. The only question in this case is whether the holder of a junior patent will be allowed to defeat an older patent for the same land by showing that the grantee named in the latter is a fictitious person. It seems to be too well settled by authority, and too obvious in reason and common sense to admit of debate, that to every valid grant there must be a grantee capa-

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ble of taking. (*Collins v. Brannin*, 1 Mo. 540; *Gallway v. Finley*, 12 Pet. 297; *Galt v. Gallway*, 4 Id. 345; *McDonald's heirs v. Smalley*, 6 Id. 261; *McCracken's heirs v. Beall & Bowman*, 8 A. K. Marsh. 1080.)

J. D. Coalter, for respondent.

I. It is impossible to prove that no such person as Samuel Johnson existed. The most that any one witness can swear on that subject is that he did not know a Samuel Johnson. The patent of the United States is conclusive on this point. (*Alison v. Hunter*, 9 Mo. 758; *Gamble v. Barry*, 8 Mo. 94; *Jennings v. Whitaker*, 4 Monr. 50; *Jackson v. Marsh*, 6 Cow. 281; *Jackson v. Lawton*, 10 Johns. 23; 1 Hen. & Munf. 306; *Polk's Lessee v. Wendall*, 9 Cranch, 99.)

Ryland, Judge, delivered the opinion of the court.

This was an action of ejectment for a tract of land in the county of St. Louis. Thomas claimed title under a patent issued by the United States, bearing date the 5th of January, 1843, to Samuel Johnson, for the land, in virtue of an entry made in land office. Thomas obtained title to the land under a decree of the St. Louis Land Court, rendered against Johnson on notice of publication without the appearance of the defendant, vesting Johnson's title in the plaintiff. The defendant claimed title, and held possession under a patent issued on the same entry to *Samuel M. Coleman*, assignee of Samuel Johnson, dated 14th March, 1845.

At the trial the defendant offered to prove that Samuel Johnson was a fictitious person, and that Thomas, the plaintiff, knew the fact when he obtained his decree and prior thereto. This evidence the plaintiff Thomas objected to, and the court ruled it out. The defendant excepted. There was a verdict for plaintiff, and judgment. The defendant made his motion for a new trial, which being overruled, he brings the case here by appeal.

The only question which the appellant makes in this court is, whether the holder of a junior patent will be allowed to defeat an older patent for the same land by showing that the

Thomas v. Wyatt.

patentee or grantee named is a fictitious person. The plaintiff having showed his patent and his decree under it for the land, the defendant contended that it was competent for him to show that Samuel Johnson, the patentee, was a man of straw—a mere fictitious person—and in consequence no title could pass to such a grantee. This evidence was rejected and as we think improperly.

There must be in existence some person or corporation or body capable of taking at the time the patent issued. Nothing could pass to the patentee by virtue of a patent emanating after his death. (*Collins v. Brannin & Tramell*, 1 Mo. 384.) In *McCracken's heirs v. Beall & Bowman*, 3 A. K. Marsh. 1082, the court of appeals of Kentucky, in their opinion, delivered by Judge Owsley, say : "Indeed we can not imagine how it is possible for any act necessary to the acquisition of right to be done in the name of a dead person, and at the same time have any legal operation. After the decease the dead person has no rights, and no rights can be acquired by others in his name. In *McDonald's heirs v. Smalley et al.*, 6 Pet. 261, Chief Justice Marshall said : "David Anderson, in whose name the entry was made under which the plaintiffs claim, was dead at the time. The entry therefore, as was determined in *Galt and others v. Galloway*, 4 Pet. 332, is in the state of Ohio a nullity. This being the foundation of the plaintiffs' action, they must fail." In *Galloway v. Finley*, 12 Pet. 297, Mr. Justice Catron, in delivering the opinion of the court, said : "The principal ground relied on for relief being that the patents were void because made after Charles Bradford's death, we will proceed to examine it. That a patent thus made passes no title is true in the nature of things ; there must be a grantee before a grant can take effect. So this court held, in *Galt v. Galloway*, 4 Pet. 345, and *McDonald v. Smalley*, 6 Pet. 261." Now the proof offered here was not that there had been such a man living, but was dead when the patent issued, but that the entry was originally made by some other person in the name of this fictitious person—this man of straw—who was not there, nor ever had been a real

Thomas v. Boerner.—Gilbert v. Boyd.

person, and that this was known to plaintiff Thomas. If such was the fact, the proof had a direct tendency to defeat the plaintiff's action. For, if Samuel Johnson, the patentee, never had any existence, then he had no title, and the decree could pass out of him and vest in the plaintiff no title. The proof should have been received. This point reverses the judgment below, and this is the only point we now decide. Let the judgment be reversed and the cause remanded; Judge Scott concurring; Judge Leonard absent.

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THOMAS, Respondent, v. BOERNER, Appellant.

1. A patent to a fictitious person is a nullity.

Appeal from St. Louis Land Court.

Buckner and Morehead, for appellant.

Coalter, for respondent.

RYLAND, Judge. This case presents the same question as the case of Thomas v. Wyatt, just decided, and to the opinion in the case of Wyatt we refer. The same character of proof was offered and for the same purpose. The court erred in rejecting the testimony offered by defendant; and for this error alone its judgment is reversed; this court holding that a patent for land to a fictitious person, not in existence, carries no title—vests no interest in any one; Judge Scott concurring; reversed and remanded.

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GILBERT, Plaintiff in Error, v. BOYD *et al.*, Defendants in Error.

1. Where a deed of conveyance is duly acknowledged and recorded, and is shown not to be within the power of the party wishing to use the same, a certified copy thereof is admissible in evidence; no notice to produce the original is required.
2. The appointment of trustees may be proven by parol evidence, where it does not appear that the evidence of the appointment is in writing.

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Error to St. Louis Law Commissioner's Court.

This was an action against the trustees of the "African Methodist Episcopal Church" to recover the value of the services of plaintiff as sexton of said church. The plaintiff recovered before the justice of the peace. An appeal was taken to the Law Commissioner's Court. The plaintiff offered in evidence a certified copy of a deed to the defendants as trustees of the African Methodist Episcopal Church, and offered to prove that the original was not in his possession or within his power or control. The counsel for defendants objected to the admission of the copy on the ground that no notice had been served requiring the production of the original. The objection was sustained. Plaintiff also offered to prove by a witness that defendants were the acting trustees of said church. Defendants objected to the reception of this evidence on the ground that there was better evidence and that the books of the church should be produced. The objection was sustained. The plaintiff submitted to a non-suit.

Bland & Coleman, for defendant in error.

L. M. Shreve, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

The 46th section of the act concerning conveyances (R. C. 1845) provides that when any instrument in writing conveying or affecting real estate is acknowledged or proved, certified and recorded, and it shall be shown to the court that such instrument is lost, or not within the power of the party wishing to use the same, the record thereof or the transcript of such record, certified by the recorder under the seal of his office, may be read in evidence without further proof. As the statute prescribes the state of circumstances which authorizes the deed to be read in evidence, we do not conceive that the court had any authority to require any other fact to be proved in order to make it testimony in the cause. The party offering the transcript was entitled to read it upon proof that

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the original was not within his power, and the court should not have required him to prove a notice to produce the original.

As the record stands we do not see that there was any written evidence of the appointment of the trustees. If there was none, the fact of course might have been proved by parol. We do not know that the rule which permits civil officers and officers of corporations to be proved to be such by reputation and their acts extends to private trustees when there is written evidence of their appointment. It is said an agent may prove his agency when it is by parol. (Greenl. § 416.) In general, the fact of an agency can not be proved by parol unless the non-production of the writing is first accounted for. (Cowen's Notes, 1208.) The official character of officers, both civil and corporate, may be proved by acts and reputation. (Cowen's Notes, 554; United States v. Dandridge, 12 Wheat. 60.) The other judges concurring, the judgment will be reversed, and the cause remanded.

GLASGOW et al., Respondents, v. NICHOLSON, Appellant.

1. Five hogsheads of sugar lying on the wharf of St. Louis were purchased by sample; *held*, that a delivery to the purchaser of the city weigher's certificate and a bill of the price constituted a sufficient delivery of the sugar.

25	29
46a	505
25	29
128	466
25	29
91a	507

Appeal from St. Louis Law Commissioner's Court.

This was an action for the price of a hogshead of sugar alleged to have been sold and delivered to defendant by plaintiffs. The court found the following facts: "That the plaintiffs were the owners of ten hogsheads of sugar, which were on the last day of November, 1854, lying on the wharf of the city of St. Louis; that the defendant purchased five of the said hogsheads by sample at their store, and requested them to have the sugar weighed early next morning. The next morning the hogsheads were weighed by a city weigher. A

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certificate of the weight and a bill of the price were delivered to the clerks of the defendant, at defendant's store, (the said five hogsheads being still on the wharf,) one of whom stated he would attend to it. On the 2d day of December following, defendant sent his dray for the sugar, but only four hogsheads could be found, which four defendant hauled away and paid for, but refused to pay for the fifth," &c. The court rendered judgment for plaintiff.

Hart & Jecko, for appellant.

Blackwood, for respondents.

SCOTT, Judge, delivered the opinion of the court.

When goods are so ponderous and bulky that they can not be manually delivered, or when they are not in the personal custody of the seller, the law does not require an actual delivery, but only that they be placed in the power of the purchaser, or that his authority as owner be acknowledged by some formal act or declaration of the seller. The law never insists upon an actual delivery when it would be impracticable. The delivery of the key of the warehouse in which the goods sold are deposited, or the transferring them on the books of the wharfinger or warehouse keeper to the name of the buyer, with mutual consent, or the delivery of the receipt ticket, sale note, or other ordinary evidence of title to goods, in the situation of goods sold, is a sufficient delivery to them. The marking of a bale of goods in a warehouse with the vendee's name is a sufficient delivery to vest title, when the contract is otherwise complete. So, if the vendor show ponderous articles, such as logs lying in a boom, this is a delivery, though the vendee allow them to remain there; for this is the only practical way of making a delivery of such articles, and the law only requires such a delivery as is consistent with the nature of the thing. Ordinarily, the place of delivery is that where the goods are at the time of sale, unless it is shown that the parties otherwise intended. (Story on Cont. 810.)

This is the case of a sale of sugar in hogsheads lying on the wharf. The hogsheads were weighed and marked by the

Mitchell v. Parker.

city weigher of St. Louis, and a certificate of the weights and marks, together with a bill for the sugar, was delivered to the defendant. He admits that he purchased the sugar, and received four out of the five hogsheads—the amount purchased—but denies that the fifth hogshead was ever delivered to him. As the sugar was sold on the wharf, that would be the place of delivery, nothing more appearing. We do not see that more could have been done than was done by the plaintiffs to effect a delivery, and that with the consent of the defendant. The facts proved are as significant of a symbolical delivery as those mentioned in the instances above; and it is clearly shown in the evidence that the means employed were those usually practiced in effecting the delivery of goods sold on the wharf in the city of St. Louis. After a delivery was accomplished, the sugar would be at the risk of the buyer; and if through his inattention or neglect it was lost, he can not be relieved from the payment of the price of it. The other judges concurring, the judgment will be affirmed.

MITCHELL, Respondent, v. PARKER, Appellant.

35	31
130	46
25	31
139	454

1. Although a New Madrid certificate should be obtained through fraud or mistake, it is not void; it is good as against the United States until it is annulled or set aside.

Appeal from St. Louis Land Court.

Morehead, for appellant.

- I. The court erred in finding from the evidence that certificate No. 119 was legally issued and legally entered. On the injured land only one certificate could lawfully issue, and that was No. 118, the first issued. There can be no doubt that all the confirmations were on the same concession, and that both certificates issued on the same injured land. The same petition, same concession, same Spanish survey, same quantity, same description and boundary—Joseph Hunot, sr., on

Mitchell v. Parker.

one side—same notice of claim, and same dates, but acted on by the board on the same notice at different times, as the reference to the minutes show. When the first certificate is issued, it operated a relinquishment of the injured land to the United States. (11 Mo. 126, 165.) The evidence did not show which of the Barsaloux owned the injured land. Watson's was the only evidence on that point. He says Grand Barsaloux owned ninety arpens *near* the village, and one hundred and fifty on the Lake St. Mary, and sold them both to Wash. He does not identify this land or speak of ninety arpens on Lake St. Mary. If it were attempted to infer that the one hundred and fifty arpens he speaks of was this land, it was the same located by certificate No. 118. There is no evidence showing that the title of Eugene, if he had any, passed to Eulalie, whether he died without issue and unmarried. Watson only says he died before Eulalie, nor is it proved whether the mother was living when Eugene died. The will was improperly admitted in evidence. (8 Mo. 427.) The plaintiff must recover on the strength of his title. (9 Mo. 488.)

SCOTT, Judge, delivered the opinion of the court.

This is an action in the nature of an ejectment. The defendant relies on no title in himself, but attempts to defeat the plaintiff's action by showing that there is no title in him. The plaintiff, in support of his title, produced a record from which these facts are gathered. On the 27th March, 1806, J. B. Barsaloux presented to the first board of the United States commissioners a claim for one hundred and fifty arpens of land. This claim is in these words: "John Baptiste Barsaloux claims one hundred and fifty arpens of land, situate in the district of New Madrid, by virtue of a grant from El Baron de Carondelet, dated May 12, 1792, to him, under the first section of the act of Congress." This was accompanied by a concession from the Spanish governor general, a survey, plat and field notes. On the last day named the board confirmed to Barsaloux one hundred and fifty arpens of land,

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being the quantity contained within the limits described in the said certificate of concession. On the 9th August, 1809, the board confirmed to Barsaloux, or his legal representatives, ninety arpens, and ordered that the same be surveyed. This claim was in these words: "John Baptiste Barsaloux, claiming one hundred and fifty arpens of land, situated near Lake St. Mary, district of New Madrid, produces to the board a concession from the Baron de Carondelet, governor general, for six arpens front by fifteen in depth." For the proceedings on the claim as first entered reference is made to commissioners' minute book No. 1, p. 213 and 214; for this last claim reference is made to book No. 1, p. 214. It is not accompanied with any documents or papers, as appears from the records before us. On the 31st May, 1811, the board issued a certificate, No. 717, to the effect that Barsaloux, or his legal representatives, is entitled to a patent under the provisions of the fourth section of the act of Congress of March 3d, 1807, for ninety arpens of land. Afterwards, in pursuance to the act of 17th February, 1815, Recorder Bates took proof of the injury done to this tract, designated by certificate 717, and granted to R. Wash New Madrid certificate numbered 119, which certificate was located on the land on dispute.

The defendant, to show a want of title in the plaintiff, gave in evidence the claim of J. B. Barsaloux, first copied in this statement. It was an exact copy of that claim. The concession accompanying this claim, and the survey, plat and field notes, all seem to be copies or counterparts of those found in the plaintiff's record. The reference to the original books of the commissioners is the same as that made in the plaintiff's evidence. On the 18th of October, 1811, the board acting on this claim granted to J. B. Barsaloux one hundred and fifty of arpens under the provisions of the second section of the act Congress of 3d March, 1807, and granted therefor patent certificate number 1268. Afterwards, Recorder Bates took proof of the injury done to this tract designated in the patent certificate number 1268, and granted to R. Wash New Madrid certificate number 118. This certificate was located on lands on the north side of the Missouri river.

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Barsaloux died having made his last will and testament, leaving two infant children, one of whom died unmarried. The survivor of them conveyed to R. Wash a tract of ninety arpens confirmed to her father, John Barsaloux ; also a tract of one hundred and fifty arpens, confirmed to her father ; both situated in New Madrid county, and subject to be relinquished for other lands by reason of having been injured by earthquake. There was evidence that there were two persons of the name of John Barsaloux in New Madrid county ; one of them had no land. On this state of facts, the defendant maintains that the two confirmations being for the same parcel of land, there can be but one New Madrid certificate for it under the act of February 17, 1815, for the relief of the inhabitants of New Madrid ; that the injured land having been relinquished to the United States by obtaining certificate No. 118, there was no authority in the officer to issue, nor any consideration for certificate 119—certificate No. 118 having been previously issued for the same land ; consequently that certificate No. 119 is void and all proceedings under it, and being so they confer no title to R. Wash for the land in dispute.

From the view we take of this matter, it is not necessary for us to affirm or deny the truth of the facts assumed in this proposition. The inferences drawn from the facts we do not acknowledge to be correct. It may be that the two confirmations were for the same tract of land ; that the two New Madrid certificates were for the same field, and that there were fraud and mistake in the proceedings, about which we give no opinion, and do not wish to be understood as insinuating there were any ; yet the defendant is not entitled to withhold from the plaintiff the land in controversy.

It is true, if the proceedings under certificate No. 119 were regarded as nullities, the plaintiff would have no right to disturb the defendant in his possession. But there is a distinction between void and voidable acts. A matter which is voidable is effectual until it is avoided by him to whom it is prejudicial ; so long as he acquiesces in the act, it is not for third persons to complain of its irregularity. But when an act is void it is as though it had not been done, and consequently it

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can not be made to affect any one. The terms void and voidable are frequently confounded by law writers, they using the word void when speaking of an act which may be avoided by suit or plea. Admitting the certificate No. 119 was issued through mistake, and that it ought not to have been issued, yet, as it did issue, and was located, it conferred title as against the United States; and so long as their act is acquiesced in, it is not for strangers to interpose and say the government has been wronged. Until the government sees fit to vindicate its claim by setting aside the voidable act, it is not for third persons to interfere in its behalf. If one has been defrauded of his property by another, can a third person thereby acquire a right to the property as against the wrongdoer. This principle has been long recognized in this court. In the case of Stewart v. Rector & Rector, 1 Mo. 256, it was held that a New Madrid certificate obtained through fraud and mistake was not void, but only voidable, and that so long as it is not avoided it stands good to all intents and purposes.

We consider that the evidence was ample to show that J. B. Barsaloux, through whose heir and devisee Wash acquired title to the land injured by the earthquakes, was the owner of the lands, and that his daughter Eulalie had a right to convey the whole of it. There is no specific objection to the validity or authenticity of the will of Barsaloux; we can see no objection to it. Judge Ryland concurring, the judgment will be affirmed; Judge Leonard absent.

LEE & GANTT, Respondents, v. PARKER, Appellants.

1. Mitchell v. Parker, ante, p. 81, affirmed.

Appeal from St. Louis Land Court.

Morehead, for appellant.

O. G. Cates, for respondents.

Porter v. Bobb.

SCOTT, Judge. This case is in all respects like that of D. D. Mitchell v. Wm. Parker, decided at the present term of the court, and a like judgment will be entered. Judgment affirmed; Judge Ryland concurring; Judge Leonard absent.

PORTER *et al.*, Respondents, v. BOBB, Appellant.

1. A merchant furnishing goods to a wife living apart and separated from her husband must ascertain at his peril whether the circumstances warrant him in giving credit to her; he must take notice that there is a separation.

Appeal from St. Louis Law Commissioner's Court.

This was an action to recover the value of goods alleged to have been sold and delivered to defendant. Upon the trial it appeared that the goods were purchased by and delivered to the wife of defendant; that the wife had left her husband's dwelling prior to the sale of the goods and during his temporary absence on business; that she never returned. The court gave the following instructions at the instance of the plaintiff: "1. The jury are instructed that a wife can act as the agent of her husband. 2. The mere fact of the wife of defendant having left his house one or two days prior to the sale of the bill of goods sued for, although without defendant's knowledge or consent, he being then absent from the city, and her going to her father's house, does not constitute a notorious desertion, or of itself relieve the defendant from liability unless knowledge of the facts was brought home to the plaintiffs." The court gave the following instructions at the instance of the defendant: "3. To entitle the plaintiffs to recover, the jury must believe from the evidence that the plaintiffs sold and delivered the goods sued for to the defendant or his legal agent. 4. If the jury believe from the evidence that the goods sued for were furnished to the wife of the defendant at a time when she lived separate from him; that she had quitted him against his will, and that the plain-

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tiffs or either of them knew of the separation, or that the separation was so notorious that they ought to have known it, they will find for the defendant. 5. If the jury believe from the evidence that the goods sued for were furnished to the wife of the defendant; that at said time she ordered the goods to be sent to her father's residence, where she was then residing, and that at said time the said defendant was occupying his own house as a dwelling, this was a circumstance sufficient to notify the plaintiff of the separation." Other instructions prayed were refused by the court. The jury found a verdict for plaintiff.

Cline & Jamison, for appellant.

P. B. Garesché, for respondents.

SCOTT, Judge, delivered the opinion of the court.

This case turns on the fact whether there was a separation between Bobb and his wife at the time the goods were furnished. The case of Harshaw v. Merryman, 18 Mo. 118, shows that where there is a separation between husband and wife, the tradesman at his peril must ascertain whether circumstances exist which would warrant him in giving credit to her. He is to take notice that there is a separation, and it is no defence to say that he had no knowledge of the fact. Whether there was a separation without the fault of the husband between the husband and wife at the time the goods were furnished is the fact to be submitted to the jury. The other judges concurring, the judgment will be reversed, and the cause remanded.

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116 258

CITY OF ST. LOUIS, Respondent, v. JACKSON, Appellant.

1. The City of St. Louis has power under its charter (see Rev. Ord. 1856, p. 188, 518,) to provide by ordinance that "no person, not being the lessee of a butcher's stall, shall sell, or offer for sale, in market or in any other place, any fresh meat in less quantities than one quarter."

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Appeal from St. Louis Criminal Court.

Wingate, for appellant.

I. Section 9 of article 5 of the ordinance relating to markets is void. 1st, There was no power vested in the city under its charter to pass such an ordinance. (Amended city charter of March 3, 1851; Taylor v. Griswold, 2 Green, 223; Phillips v. Wickam, 1 Page, 598; 2 Kent, 295.) Said section was in restraint of trade. (Angell & Ames on Corp. § 332-8; Dunham v. Trustees of Rochester, 5 Dow. 462; Freeholders v. Barber, 2 Halst. 64.)

II. The necessity of introducing the charter in evidence is not dispensed with.

Jecko, (city attorney,) for respondent.)

Ryland, Judge, delivered the opinion of the court.

This was a suit for a penalty given by an ordinance of the city for retailing fresh meat in quantity less than a quarter, without being the lessee of a butcher's stall. There was a trial and judgment against defendant in the recorder's court, from which he appealed to the Criminal Court. Judgment was again rendered against the defendant, and he brings the case by appeal to this court.

It appears from the bill of exceptions that on the trial the plaintiff read in evidence section 9 of the 5th article of an ordinance of the city of St. Louis relating to markets, as follows: "No person not being the lessee of a butcher's stall shall sell or offer for sale, in market, or in any other place, any fresh meat in less quantities than one quarter;" also read section 29 of said act, as follows: "Whoever shall violate any of the provisions of this article, or shall fail to obey any legal order of the market-master in relation to any matter placed under his official charge, shall forfeit and pay not less than three nor more than one hundred dollars." The plaintiff also introduced John Newcomb, a witness, who testified that defendant on the 14th day of March, 1856, kept a

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meat shop on the corner of Tenth and Wash streets, in said city of St. Louis; that witness was in defendant's shop on that day, and other days previous to that day, and saw defendant and his wife sell fresh meat to different persons by a less quantity than one quarter; and that he had seen defendant's wife and defendant attending in said shop and selling fresh meat to different persons by a less quantity than one quarter, at several times from the 1st to the middle of March. On cross-examination witness stated that he did not see defendant sell any meat on the 14th of March; thought that defendant was not in the shop at the time his wife was selling meat on the said 14th day of March; which was all the evidence introduced on both sides. The jury found the defendant guilty, but were unable to fix the amount of the fine; the court fined him ten dollars, and gave judgment for that sum and costs. The record shows no exception taken to any evidence given on the trial below, and no instructions were asked or given as appears from the record.

The defendant moved in arrest of judgment, stating that, 1st, there was no sufficient cause of action appearing on the face of the complaint filed by the plaintiff herein against the defendant; 2d, there was no power vested in said City of St. Louis or its officers by virtue of any law or charter erecting said city into a corporation, whereby said city as a corporation was permitted, empowered or authorized to ordain, establish or enforce said section 9 of article 5 of ordinance No. 3502, in relation to markets, at the time of its adoption; 3d, that said section (and for a violation of which said complaint is made) is too general in its terms, in restraint of trade, oppressive upon the citizen, contrary to the general principles and policy of the laws of the state of Missouri, and therefore void; and for a new trial, 1st, because the verdict of the jury is contrary to the law and the evidence; 2d, that the verdict of the jury is contrary to the evidence. These motions were both overruled, and the appellant seeks to reverse the judgment below on the ground that the ordinance, the 9th section at least, is void; 1st, because there was no power vested in

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said city by any law or charter authorizing the city to ordain or establish the same; 2d, that it is in restraint of trade and contrary to the general principles and policy of the laws of Missouri.

In the second section of the third article of the amended charter of the city, the mayor and city council shall have power within the city, by ordinance, to make many regulations; the 31st subdivision is as follows: "To regulate the inspection of butter, lard, and other provisions; to regulate the vending of meat, poultry and vegetables; to restrain and punish the forestalling of poultry, butter, eggs, and fruit, and to suppress hucksters." By the twelfth section of the same article, "All ordinances of the city may be proven by the seal of the corporation, and when printed and published by authority of the corporation, the same shall be received in evidence in all courts and places without further proof." The act amending the charter is declared to be a public act, and may be read in evidence in all courts of law and equity in this state without proof. There is nothing in the objection, taken here for the first time, that the ordinance was not properly proved or authenticated before it was read to the jury. There was no objection to its being read saved, as we can find, and we will not listen to such an objection here. If the defendant wished to take advantage of the matter, he should have made the proper motion in proper time below, where the party might have it in his power at once to have obviated the objection by showing that such an ordinance was properly passed and was in full force. The amended charter expressly authorizes the city mayor and council to regulate the sale of meat by ordinance. There is nothing then in the objection as regards this point. The city ordinance was properly within the powers granted to the corporation.

And we are unable to see how it operated in restraint of trade. Here the defendant is required to obtain a stall in some market if he wishes to sell fresh meat in less quantity than one quarter. We look upon this regulation as both politic and proper. There is no better way to manage

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and control the hucksters and vendors of meats, &c., than by fixing a place for the sale of such commodities. There is not so much danger of unwholesome meats, of impure and unsound meats, being exposed to sale now as there would be if there were no such ordinance. The reasoning in the case of Dunham v. Trustees of Rochester, 5 Cow. 465, will not embrace the case of the City v. Jackson. This ordinance is not against any known law of our state, nor does it interfere with the right of selling the commodities of our citizens; it requires that the person retailing fresh meat shall have a stall in some market for that purpose. The city undergoes heavy expense in erecting commodious and convenient market houses; it rents the stalls of those houses to butchers and others retailing fresh meats; the rents are of importance by way of income to the city. Now to permit any one who may think proper to put up a block or shanty on any street or alley, or corner of any street or alley, for the purpose of selling fresh meats in quantity less than a quarter, and thereby withdraw the purchasers from the market houses, is at once giving to such retailers a very great advantage over those who rent the stalls and pay a high price for them.

We consider such an ordinance highly proper; it is calculated to keep the market in a healthy condition—not only so, but to preserve the health of the city, but watching carefully the vendors of fresh meats—making such meats to lie open and exposed to the control and supervision of the market-master. Upon the whole record we find no error. Let the judgment therefore be affirmed; the other judges concurring.

GRIMM, Appellant, v. GAMACHE, Respondent.

25	41
173	248

1. Objections to the admission of testimony should be specific, not general.

Appeal from St. Louis Court of Common Pleas.

D. C. Woods and Goff, for appellant.

P. B. Garesché, for respondent.

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RYLAND, Judge, delivered the opinion of the court.

This was a suit to recover damages for the mal-performance of a building contract, and for damages sustained to the plaintiff's property by reason of the falling of the building. There was a trial below, and verdict and judgment for defendant; a motion for a new trial was made and overruled, and the plaintiff brings the case here by appeal.

The only points raised in this court by the appellant for reversing the judgment depend upon the rulings of the court below in admitting the record of a suit in the Circuit Court of St. Louis county between the same parties on a note given on account of the same contract, the foundation of this present suit; the rejecting parol evidence to contradict the record so given in evidence, and the refusing to give as well as the giving of instructions. There is nothing in the question about the admission of the record, and nothing in refusing to admit parol testimony to contradict it. When the record was offered in evidence the plaintiff objected, but he made no specific objection—pointed out no defect; nothing was brought to the mind of the court in order to pass upon the admissibility or incompetency of the evidence. This general objection has again and again been decided by this court as in fact amounting to no objection. The practice of making wholesale objections to the admission of a document as evidence, and then coming here for the purpose of pointing out specific causes of objection, specific defects, which, if mentioned below, could in most cases be obviated by the adverse party immediately, has met the decided disapprobation of this court. We will not regard such objections. We will not subject the inferior courts to the task of examining documents, of poring over long and sometimes nearly illegible instruments of writing and of records in order to ascertain whether or not they can be admitted in evidence. Let the objecting party point out the causes for which he objects, and then the court can at once see, and the adverse party have the opportunity of remedying or of doing away the objections.

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As to the instructions given, we are of opinion that some of the instructions are calculated to mislead the jury, and were improper. Before we notice them separately, we must be permitted again to condemn the practice of giving so many and such useless instructions as from time to time appear in the records coming up to this court. Instructions are to assist the jury in forming their verdict according to the legal principles involved in the controversy—to instruct them how to arrive at a proper conclusion from the proof before them, according to the law governing the case. The instructions given by the court, of its own motion, are as follows: " 6. If the house in question was not built according to the contract between the parties, and the plaintiff knew of the defects and did not notify the defendant thereof, nor cause the same to be repaired, but continued to use and enjoy the same after having accepted it; and if the house afterwards fell down in consequence of said defects or the failure to repair the same, then the plaintiff is not entitled to recover for any damages he sustained from the falling of said house, if the said defects could have been repaired. 7. If the defendant contracted to build for plaintiff a brick house for the purposes alleged in the petition, then the defendant was bound to build for the plaintiff a good and substantial house. 8. If the jury believe from the evidence that the defendant contracted with the plaintiff to build for him a house as stated in the petition, and that said house was not built in a good workman-like manner, and of good material, and that the plaintiff sustained damages therefrom, then the jury should find for the plaintiff. 9. If the jury believe that there was a special contract between the parties for the building of said house, and that after the same was built the plaintiff accepted the same, then the plaintiff must show to the satisfaction of the jury that the said house was not built according to contract, and unless the defects were not known to the plaintiff and not visible or open to observation, then the plaintiff must show the difference in the value of the house as it actually was at the time, and what its value would have been if it had been

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built as contracted for, and that difference will be what the plaintiff is entitled to recover if he paid for said house according to the terms of the contract. 10. If the defendant agreed with plaintiff to build him a house fit and proper, and strong enough to answer the purpose specified in the petition, and the defendant failed to comply with his agreement, then the plaintiff is entitled to recover. 12. If the jury believe from the evidence that the contract was only to build a dwelling or boarding house, and not a dancing hall, and said house was built in a good workmanlike manner, and of good materials, and of sufficient strength for a boarding and dwelling house, then the jury should find for the defendant. 13. If the house in question was thrown down by a tornado, and not in consequence of any defect in workmanship or materials, then the jury should find for the defendant. 14. If the jury believe from the evidence that the defendant did not make the contract set out in the petition, or that if made by him he performed the same as agreed by him in a good workmanlike manner, and of good materials, or that said house did not fall down from any defect in workmanship or materials, then the plaintiff can not recover for any injury done or damages sustained from the falling of said house. 15. If the defendant made the contract set out in the petition, and after the house was built the plaintiff accepted the same as done in accordance with the contract, and paid therefor the contract price, and if said house was defective in workmanship or materials, and the plaintiff knew of said defects, or they were open to observation, then the measure of damages, if plaintiff paid the contract price as agreed, is the difference in value between what the house was really worth as it was built, and what it would have been worth if it had been built as contracted for. 16. If the contract alleged was made by the defendant and the defendant failed to perform the contract on his part, and when the plaintiff accepted the same he did not know of any defects in workmanship or materials, or they were not open to observation; and if, after the plaintiff accepted the same, the said house fell down in conse-

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quence of defective workmanship or materials, then the measure of damages will be what the evidence shows the plaintiff actually sustained in consequence of said defects. 17. If the defects in workmanship or materials complained of did cause the fall of the house and the plaintiff knew of said defects, or they were open to observation when the plaintiff accepted the house, and he did not repair the same or cause the same to be repaired, but used the house as it was built, then he can not in any event recover more than what it would have cost to repair or remedy said defects."

The first instruction here given, being No. 6, has reference, not to the mal-performance of the contract to build, but to any damages sustained by the plaintiff by the falling of the house. The objection to the instruction is in reference to the phrase "after having accepted." This phrase would do very well when used in regard to movable property. But surely the idea of a contractor building for a man a house on the owner's land, and the owner not ordering it to be pulled down or taken away, or his even using it, can not be such an acceptance as will destroy his right to sue for any violation of the contract, if such violation be known or unknown at the time. The instruction had no tendency to assist the jury in forming a proper verdict in the case. Now if the evidence showed that the house was so badly built or built of such frail materials that a prudent man would not risk his property in it, if he could see the danger by merely examining the outside appearance, and the owner did put property—furniture, for instance—in such a house, then the owner must lose by his own carelessness. He can not recover for such loss caused by the falling when he, as a prudent man, should not have run the risk. But this does not interfere with his right to sue for a violation of the contract to build. We consider the instruction confines the point of recovery to the damages sustained alone by the mere falling of the house, and, as we think the plaintiff can not recover for any other injury than such as arises from the breach of the contract to build, and

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not merely remote consequential damages, we would not reverse for this instruction alone.

The seventh and eighth instructions may be looked upon as producing no injury to the plaintiff. The ninth instruction is improper. Here the phrase, "plaintiff accepted the same," again is used. The jury could be easily misled by this instruction, and it was error to give it. The tenth and twelfth instructions did not injure the plaintiff. There is none marked as eleventh. The thirteenth instruction did not particularly draw the jury's attention to the fact whether it was the improper or defective workmanship, or improper or insufficient materials used in the building, that caused it to give way before the force of the tornado or not. This instruction puts the falling of the house as caused by the tornado in one point of view, or as caused by defective workmanship or the materials in another point of view. Now if it was the improper and insufficient workmanship, or the defectiveness or insufficiency of the materials used, that rendered the house unable to withstand the tornado, then the tornado did not alone produce the damages, and the defendant should not be permitted to hide himself and escape from the consequences of his own conduct behind the force of the storm. This instruction was erroneous. We see no error in giving the fourteenth instruction. The principles laid down in the fifteenth, sixteenth and seventeenth instructions, in regard to damages, can not have prejudiced the plaintiff's case; but the phrase, "accepted the house," or "accepted the same," runs through these instructions, and renders them objectionable. All the way through this long string of instructions the court has been applying the terms of law used in regard to movable property to this contract to erect a house for a man on his own land. Now we will not pretend to say but that the owner may do such acts in regard to the house as will plainly show to the jury that he considered the contract completed and the work performed in accordance therewith, and that he considered the workman discharged from all liability on account of the contract. But to say that a man accepts

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a house built on his own land, is to use a phrase well calculated to mislead a jury.

As to the instructions asked by the plaintiff, the first and second were properly refused; of the others, the principles proper to be given were substantially stated to the jury by the court. This court finds nothing improper in refusing to give the instructions asked, when considered with those given by the court.

We can not dismiss this subject without remarking, that this is a most unnecessary suit—a most uncalled for appeal to the courts of the country for redress. There is pending a suit which was before this court and reversed and remanded, in which the matters set forth in this suit are used by defendant in that other suit as a defence, and which this court said he could use to reduce the debt due to the plaintiffs in that action. (Gamache v. Grim, 23 Mo. 38.) Let the judgment below be reversed, and the cause remanded; the other judges concurring.



GARRISON, Respondent, v. SAVIGNAC, Appellant.

25	47
41a	445
25	47
46a	15
47a	628
25	47
76a	559

1. A person in possession of premises at the commencement of an action of ejectment, to which he is not made a party, can not be dispossessed by virtue of a writ of *habere facias possessionem* issued under a judgment for plaintiff in said suit.
2. If in the execution of such writ a person in possession of the premises at the commencement of the suit, and not a party thereto, is dispossessed, and possession given to the plaintiff, and upon the removal of the force the person dispossessed returns to the possession, the plaintiff will not thereby acquire such a possession by the execution of the writ as will entitle him to sustain an action of unlawful detainer against the person so returning to the possession.

Appeal from St. Louis Land Court.

This was an action of unlawful detainer commenced October 10, 1854. The plaintiff, Abraham Garrison, in his complaint, charges that on the 19th and 20th days of August, 1854, he was lawfully possessed of the premises in controver-

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sy ; that, being so possessed thereof, the defendant, Francis Savignac, on or about the 23d day of August, 1854, wrongfully and without force, by disseisin, obtained possession of the same, &c. The cause was taken to the St. Louis Land Court by certiorari. The plaintiff introduced in evidence the original record and proceedings in an action of ejectment in which Abraham Garrison, plaintiff in this action, was plaintiff, and Alfred Savignac defendant. In said action of ejectment in the Circuit Court of the United States, in which said Garrison sought to recover the premises in controversy in the present suit, a recovery was had by the plaintiff, and a writ of *habere facias possessionem* was issued, and the marshal of the United States puts the said Garrison in possession, by his agent, of said premises, and removed from the possession of same Francis Savignac, the defendant in the present suit. The said Francis was not a party to the said action of ejectment. The evidence introduced by plaintiff also showed that Francis Savignac lived upon the premises at the time of the execution of said writ ; that he refused to deliver up the premises when demanded by the marshal, saying that he was not defendant in the ejectment suit ; that he and his furniture were then (August 19th, 1854,) removed by force ; that the family of said Francis Savignac the next morning after the forcible removal, and said Savignac a day or two thereafter, resumed the possession of said premises ; that a demand in writing had been made for the possession of said premises by plaintiff.

Defendants introduced evidence showing that Francis Savignac had been in possession, and the only person in possession, for several years before the institution of the ejectment suit against Alfred Savignac ; also that the judgment for plaintiff in said suit had since been reversed by the Supreme Court of the United States.

The court, at the instance of the plaintiff, then gave to the jury the following instructions : " 1. The writ of possession read in evidence by the plaintiff commands the marshal to put the plaintiff in possession of the land described therein without reference to the persons who may be in possession at

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the time the writ issues; it does not tell the marshal to put any particular person out of possession, but to put all persons out except the plaintiff, who is to be put into possession. 2. If the jury find for the plaintiff they must find the value of the premises monthly, and assess the damages sustained by the plaintiff by reason of the unlawful entry and detainer."

The defendant then asked the following instruction, which was given : " 1. The court instructs the jury that unless they believe from the testimony before them in this case that the plaintiff Abraham Garrison had been, or was personally, or by his agent duly authorized, in actual possession of the premises in contest prior to the 20th day of August, 1854, plaintiff can not recover in this case."

Defendant also asked the following, which were refused : " 2. The court instructs the jury that if they find from the evidence in this case that the defendant was in peaceable lawful possession of the premises in dispute prior to and up to the 19th day of August, 1854, and that on that day the defendant was ejected from the premises by the United States marshal, on proceedings alleged to be legal proceedings, and the possession thereof delivered by said marshal to any other person than the plaintiff himself personally, then the plaintiff can not recover in this case, unless it shall be shown by the testimony in this case that said possession was delivered to said person with the knowledge and consent of said plaintiff, and that said person was specially authorized by the said plaintiff as his agent to receive said possession. 3. The court instructs the jury that if the defendant was in possession prior to the filing of the suit read in this case of Abraham Garrison v. Alfred Savignac, in the United States Court, and was not a defendant in said suit, that the execution issued from the United States Court in that case did not authorize the marshal to expel Francis, the defendant in this case, from his possession, and in that case the plaintiff had not a legal right to the possession of the premises. 4. The court instructed the jury that if the possession of the premises in dispute was taken from the defendant on the 19th day of

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August, 1854, by the United States marshal, and delivered to any other person or persons than the plaintiff, and that said persons or either of them were acting as general agents or attorneys in fact for said plaintiff, legally authorized by him to act as such, without special reference to the possession of said premises as passing from said United States marshal to said persons, and without special authority, directions or agency to receive said possession, and that said possession was taken by said United States marshal in pursuance of an execution issued on a judgment in the Circuit Court of the United States for the district of Missouri, in favor of said plaintiff, against said defendant, and that at said time said cause was depending in the Supreme Court of the United States on a writ of error, and that since said time said judgment has been reversed in said Supreme Court, that then the plaintiff in this case had not a legal right to the possession of the premises in question on or before the 23d day of August, 1854, and can not in this case recover. 5. This section is a statutory provision in derogation of the remedies at common law, and must be strictly construed. If the jury find from the evidence that every requisition of the statute has not been fully complied with strictly by the plaintiff, they must find for the defendant. 6. Before the plaintiff can recover in this action, he must show a *legal right to the possession of the reality in question*. If the jury find from the evidence that the plaintiff has failed to establish a legal right thereto they must find for the defendant. 7. A 'legal right' to the possession of reality is that which is founded on a just and rightful claim of the peaceful occupation and enjoyment thereof by ownership therein, whether the same be absolute or qualified, perpetual or limited. If the jury find from the evidence that the plaintiff has failed to show such just and rightful claim to the peaceful enjoyment and occupation of the property in question by an ownership thereof, whether absolute or qualified, in perpetuity, or limited, at the time of the alleged disseisin, they must find for the defendant."

Morehead, for appellant.

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I. The plaintiff had not the legal right to the possession, as his own evidence shows. The execution was against Alfred Savignac, who was not and never had been in possession. It may be said that the marshal was compelled to execute fully the process in his hands. It might be a justification for the officer, but can not confer upon the plaintiff the legal right. The writ should only have required the marshal to turn out the defendant in the ejectment suit, and all persons who held under him or came into possession after commencement of the suit. On the 10th of October, 1854, when the demand in writing was made, the plaintiff had not a legal right to the possession: Only a person who has been in possession can maintain a legal right to the possession. (11 Mo. 605.) The plaintiff had never been in possession. Constructive possession is not sufficient. (6 J. J. Marsh. 346.)

Krum & Harding and *T. T. Gantt*, for respondent.

I. It does not appear that all the evidence heard on the trial is preserved in the record.

II. It was incumbent on the plaintiff to show himself legally in possession before the disseisin by the wrongful act of the defendant. It was competent for him to show that he was lawfully put in possession under the writ of *habere facias possessionem*. The writ and the judgment under which it was issued are legal and competent testimony. To entitle the plaintiff to recover it was necessary that he should show, 1st, that he had been in the lawful possession of the premises in question, and 2d, that the defendant wrongfully and without force by disseisin obtained possession of the premises. The testimony abundantly shows that the plaintiff was in lawful possession of the premises. It is equally clear that the defendant wrongfully by disseisin got possession. The instructions given by the court put the case both as to the law and the facts fairly before the jury. (8 Mo. 276; 14 Mo. 17, 434.)

SCOTT, Judge, delivered the opinion of the court.

It is evident that as far as the merits of this case are concerned they are all against the plaintiff, as the possession,

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the disturbance of which he complains, was obtained by means of a writ of a *habere facias possessionem* which issued on a judgment, which since the execution of the writ has been reversed.

The defendant in the original suit, Alfred Savignac, and against whom the writ of *habere facias possessionem* was issued, testified that he never was in possession of the lot in controversy. The defendant in this proceeding, Francis Savignac, was turned out of the possession of the lot by the marshal, though he was no party to the suit, was not named in the writ, and though he had been in the undisturbed possession of it for six years prior to the bringing of the suit.

Had application been made to the court whence the *habere facias possessionem* issued, we see no reason why the court would have refused to award restitution, as it would not suffer its process to be perverted to the oppression of those who were no parties to it. It is said to be a settled rule of practice that no tenant who was in possession anterior to the commencement of an ejectment, can be dispossessed upon a judgment and writ of possession to which he is no party. (*Ex parte Reynolds*, 1 Caines, 500; *Hickman v. Dale*, 7 Yerg. 149; *McCord's heirs v. McClintock's heirs*, 5 Litt. 305.) If the defendant Savignac had refused obedience to the process of the officer, as he had a right to do, it not being against him, the court, under the circumstances, never would have allowed a writ of attachment against him. (*Adams on Ejectment*, 310.)

As the officer had no authority to dispossess the defendant, and as the defendant refused submission to his authority, but yielded to force, and returned to his possession so soon as the force was away, we can not say that the plaintiff by such means acquired such a possession as would entitle him to the remedy he has adopted. It is clear that if the officer had applied to the court for aid in dispossessing the defendant it would have been refused him, and there is no reason why the plaintiff, by taking the law in his own hand, should be in a better situation than if he had appealed to the law.

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We are of opinion that a sanction given to this proceeding would be the means of creating a precedent that might be productive of much injustice and oppression. Just think of it! A man who has been in possession of his premises for six years; another, wishing to obtain possession of them, will not sue the actual occupant, but brings a suit against a stranger who never was in possession of the premises—who neither knows nor cares any thing about them. Against such a defendant a judgment is a thing of course. A writ is afterwards sued out, and the real tenant, who is no party to the proceeding, and who may never have heard of it, is turned out of house and home without a moment's warning. The mere possession of land is frequently a matter of much importance where there is to be litigation respecting its title, and by sanctioning this proceeding an opening will be made whereby one may obtain possession of land, his title to which he was unwilling to expose in a court of justice. The case of Higginbotham v. Higginbotham & Clark, 20 B. Mon. 309, is one in which the same defence to a writ of forcible entry and detainer was set up that has been made in this suit. The defendants did not succeed; but that was not on the ground that their defence was not properly conceived, but that the facts in evidence did not make it out; had the defence proved here been made out, the case is an authority for saying that it would have been a valid one. Judge Ryland concurring, the judgment will be reversed, and a judgment for the defendant; Judge Leonard absent.

WAINWRIGHT, Plaintiff in Error, v. ROWLAND, *et al.*, Defendants in Error.

1. A. instituted a suit for specific performance of an agreement to convey an undivided interest in certain premises, claiming also compensation for improvements made by him, with the consent of the vendor, upon a portion of said premises; the court rendered a decree vesting in A. an undivided interest of one-half, but allowing no compensation for improvements; held, that

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- A. would not be entitled, in a suit for partition, to have allotted to himself that portion of said premises upon which said improvements had been made or to have compensation made therefor.
2. Lands may be subdivided for purposes of sale, in an action for partition, as well as for partition in kind.

Error to St. Louis Circuit Court.

This was a suit for partition against the heirs of Ellis Wainwright. Plaintiff, to show title in himself, introduced a decree in a suit in chancery, commenced in the year 1849, in which the plaintiff in this suit was complainant, and the heirs of said Ellis Wainwright defendants. By this decree an undivided interest of one-half in the premises in controversy in the present suit was vested in the complainant. In the bill in chancery, which was for the specific performance of an agreement to convey, the complainant set forth that in the year 1848, by previous understanding and arrangement with the said Ellis Wainwright, he (complainant) had built, at his own expense and for his own use, a dwelling-house upon a portion of the premises embraced in the bill. The decree made no allowance to complainant for such improvements. Plaintiff offered to prove in this action that in the year 1848 he was the equitable owner of an undivided half of the premises described in the petition; that he and Ellis Wainwright (who held at the time the legal title to the entirety of said premises) were in possession of the same as owners in common; that in said year 1848, plaintiff, by consent of said Ellis, built a dwelling-house and appurtenances upon said premises for his own use, and paid for the same with his own money, and occupied and lived in said dwelling-house until after the decease of said Ellis; that said Ellis and plaintiff always considered said dwelling-house as the property of plaintiff, as equitably belonging to him; that said dwelling-house and appurtenances are permanent improvements, worth \$850. The defendants objected to the introduction on the ground that the plaintiff was estopped by the decree. The objection was sustained. The plaintiff in his petition prayed the court

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to allot to him that portion of the premises upon which said improvements had been made, or to compensate him for the improvements.

The commissioners in partition reported that the land could not be divided, and recommended that the same be sold in lots in accordance with a plat of the subdivisions made by themselves. The plaintiff moved to set aside the report and order of sale, 1st, because the commissioners had not set off to the plaintiff the part upon which he had erected his improvements ; 2d, because the commissioners had no authority to subdivide the land with a view to a sale ; 3d, because they had no authority to incur the expense of surveying.

Whittelsey, for appellant.

I. The plaintiff was entitled in the partition to have the part of the land upon which he had erected his improvements set off to him, or, if that could not be done, to receive compensation from the rents, or the proceeds of the sale. For this purpose he was entitled to have his rights determined by the decree. (*Spitts v. Wells*, 18 Mo. 468 ; 2 *White & Tud. L. C.* 503 ; *Swan v. Swan*, 8 *Price*, 518 ; *Brookfield v. Williams*, 1 *Green Ch.* 341 ; *Conklin v. Conklin*, 3 *Sand. Ch.* 64 ; *St. Felix v. Rankin*, 8 *Edw. Ch.* 323 ; *Town v. Weedham*, 8 *Paige*, 546, 553 ; *Teal v. Woodson*, 3 *Paige*, 470, 474.)

II. The decree vesting the title was no estoppel against the claim for improvements. The house had been built by plaintiff for his residence, with the consent of his co-tenant, and the cost of the improvements did not and could not go into the settlement of the partnership accounts of E. & S. Wainwright. The matter was not adjudicated as a matter of fact, and was therefore not a bar. (2 *Smith's L. C.* 443 ; *Outram v. Morehead*, 3 *East*, 346 ; 1 *Greenl. E.* 528 ; *Arnold v. Arnold*, 17 *Pick.* 7 ; *Cow. & Hill's notes*, 1 *Phil. Ev.* 821 ; *Hopkins v. Lea*, 5 *Wheat.* 109 ; *Jackson v. Hunt*, 10 *Wend.* 80.) Under the present code the pleadings are special, and the pleadings and judgment or decree offered in evidence show that the rest of these improvements did not go into the account or pleadings or decree. The judgment of the court

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in the present case leaves the plaintiff liable to account for one-half of the rents of the property improved, whereas in equity he should be charged only with the one-half of the ground rents.

III. The commissioners had no authority to subdivide the lot except for partition in kind. (Act 1845, p. 767, secs. 20, 21, 22, 28.) The plat returned shows that the commissioners might have set off to the plaintiff part of his land, and thus have avoided part of the costs of sale.

Gibson and Krum & Harding, for defendants.

Ryland, Judge, delivered the opinion of the court.

This was a suit for partition of a certain lot of ground lying in block No. 39 in the city of St. Louis, being the whole of the north-east quarter of said block 39, except twenty-three feet front on Main street, by sixty-two feet two inches on Almond street in depth. The plaintiff says he is owner in fee of one equal undivided half of said lot of ground. He alleges that he had erected a house upon the lot of ground held in common with consent of his co-tenant, and by his own means. He asks that this part of the lot on which he had built his house may be assigned to him without charging him with the value of the improvement, or that he may be allowed for the improvement so made by him. Upon the trial, it appeared that the plaintiff's title was derived under a decree of the Circuit Court of St. Louis county, sitting as a court of chancery, declaring him entitled to one undivided half of the lot upon a bill for a specific performance, in which bill the complainant (the present plaintiff) set forth the alleged fact as to his building of this very house, with his own means, and by his then co-tenant's consent. This claim was disregarded by the court in this present case, and the commissioners reported against a division in specie, and for a sale, and subdivided the lots by streets and alleys for the purpose of the sale. The plaintiff objected to this course, and brings the case here by writ of error.

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The plaintiff showed no right to demand any thing for the building by him erected on the lot in question ; no right to have that portion on which the building stood allotted to him by the commissioners. His title is derived under a decree in chancery. This building and the possession of it by plaintiff, and the averments about its being made and erected at the costs of the plaintiff individually, were all matters alleged in the bill in chancery ; yet the decree only declares him entitled to an equal undivided half of the lot of ground ; does not give him any claim to demand the particular price or part covered by his building, or to demand pay or remuneration for his building. He proved title to an undivided half of the lot—title, too, declared by a decree in chancery after the building had been erected. There is not the slightest ground for his demand of any particular portion of the lot to be partitioned off to him, or to be allowed for any building put on it by him.

The commissioners reported that a sale was necessary, the lot being incapable of partition in specie without injury to the owners ; and in their judgment the lot of ground would bring more by being laid off by streets and alleys into lots. No doubt these commissioners were better qualified to decide upon this measure than the courts, and, having made their report, we shall not reverse the judgment below approving and confirming it.

In looking over the whole record of the proceedings below, we find nothing done of which the plaintiff has any right to complain. Let the judgment therefore be affirmed ; the other judges concurring.

HOLLAND, Respondent, v. STEAMBOAT R. H. WINSLOW, Appellant.

1. Strict conformity with technical rules of pleading should not be enforced in proceedings before justices of the peace.

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2. A complaint filed before a justice of the peace against a steamboat is not rendered fatally defective by reason of the fact that the demand was stated therein to have "accrued against the said steamboat on account of the mate, the captain, or the clerk, agents thereof, for work and labor done on board of said steamboat as a laborer," &c.

Appeal from St. Louis Law Commissioner's Court.

N. McDonald and Hudson & Thomas, for appellant.

G. Lewis, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This case presents the single point in regard to the complaint and affidavit filed by the plaintiff. The complaint is as follows: "Timothy Holland complains that he has a demand against the steamboat R. H. Winslow, a boat used in navigating the waters of this state, amounting to two dollars and sixty cents, which demand accrued against the said steamboat on account of the mate, the captain, or the clerk, agents thereof, for work and labor done on board of said steamboat R. H. Winslow as laborer, within the thirty days next preceding the commencement of this suit, and is in all its particulars as follows, to-wit:

"1855. April 23. Steamboat R. H. Winslow, to Timothy Holland, Dr. To 13 hours' labor and work done on board of said steamboat R. H. Winslow, at 20 cents per hour—\$2 60. And the said Timothy Holland further states that he has now no other demand against the said steamboat R. H. Winslow, which is a lien thereon."

"Timothy Holland being sworn on his oath, says that the facts set forth in the above complaint are true. [Signed] Timothy Holland."

"Sworn to and subscribed before me, this 24th day of April, 1855. [Signed] Jeremiah Langton, Justice."

The plaintiff filed his bond with security, and a warrant was issued against the boat, executed as the law directs; at the return day, the plaintiff appeared ready for trial; the defendant made default and answered not. The plaintiff sub-

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mitted his case to the justice, who heard the evidence, and rendered judgment in favor of the plaintiff against the defendant for the sum of \$2 60 and costs. The defendant afterwards appealed to the Law Commissioner's Court. When the transcript was filed in the Law Commissioner's Court, the parties appeared, and defendant moved to quash the complaint filed, and to dismiss the cause, because, 1st, said complaint does not set out or show with sufficient certainty the person on whose account said alleged demand accrued ; 2d, because said complaint is void for uncertainty ; 3d, because said complaint is not verified by affidavit as required by law ; 4th, because the supposed affidavit is informal and insufficient. The Law Commissioner overruled this motion, and upon a trial the plaintiff again recovered judgment for \$2 60. The defendant moved for a new trial, which being denied, the cause is brought here by appeal.

The bill of exceptions shows that the plaintiff labored for defendant for 13 hours at 20 cents per hour—making \$2 60 ; that such was the agreement ; that the mate of the boat employed some twenty-two or twenty-three hands, and that plaintiff was one ; and the price for the work was twenty cents per hour. The evidence leaves no doubt as to the price agreed to be paid and the time engaged in the work ; and it was the duty of the employers to have paid the wages according to the contract, and not suffer themselves or their boat to be sued for the wages. The clerk offered to pay the laborers \$1 50 per day ; they refused to accept that sum, and demanded the amount due by their contract.

Now what is the defence made by the boat to this action ? There was none made before the justice of the peace ; judgment was suffered to be entered there by default against the boat ; afterwards the case was carried to the Law Commissioner's Court, where a motion was made to quash the complaint ; there was no defence pretended to be set up against the merits of the demand ; but because the ignorant laborer did not specially name the one officer of the boat who made the contract with him to do the work, the defendant moved

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after judgment by default to quash the complaint. Now what is the defect? The plaintiff states the amount of his claim; he says it accrued against the boat on account of the mate, the captain or the clerk, agents thereof, for work done on board the boat as a laborer. Now because the plaintiff does not state under his oath which particular one of these agents, the mate, or the captain, or the clerk, but names them all as agents, and avers that one of them employed him, his suit is to be dismissed. We will not, after having so often refused to apply the strict technical rules of pleading to proceedings before justices of the peace, lend a willing ear to this objection. The laborer knew that he was employed by an officer of the boat—an agent of the boat—but whether he was the mate or captain or clerk, he did not feel able to swear. The person employing him was in one or the other of these capacities, and here is a positive statement that he was employed by an agent of the boat. This is certain enough. It would be contrary to the general decisions of this court to regard such omissions of precise, utmost care and certainty as fatal. The complaint then we think certain enough, and the affidavit is good enough, and the proof is amply sufficient to sanction the plaintiff's cause of action.

Let the judgment therefore be affirmed; Judge Scott concurring; Judge Leonard absent.

25	60
41a	323
25	00
43a	260

**GOODFELLOW, Respondent, v. NOBLE, Appellant.**

1. It is no defence to a suit for the recovery of rent, that the defendant had entered into the occupancy of the premises under an agreement with the plaintiff that he (the plaintiff) would execute a lease therefor for the term of three years, and would make certain repairs, the making of the repairs not being a condition of the leasing, and that the plaintiff neglecting and refusing to do the same, he (defendant) repudiated the contract and abandoned the premises.

Appeal from St. Louis Land Court.

Gibson, for appellant.

I. Where one enters into the possession of land under an

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agreement with the landlord that he will execute a lease for three years, and the landlord after the entry refuses to comply with his contract, this is a fraud that authorizes a repudiation of the contract in toto.

Cline & Jamison, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This was an action before a justice of the peace for seventy-five dollars for three months' rent of a dwelling rented by defendant of plaintiff in the city of St. Louis. The plaintiff recovered judgment, and the defendant appealed to the Land Court. Upon the trial in the Land Court the plaintiff made out a *prima facie* case. The record has the following entry: "On the trial the plaintiff gave evidence *prima facie* proving his case." The defendant then offered to prove "that he entered into the premises under an agreement with the plaintiff that plaintiff would execute to him a lease therefor for three years, and to do certain repairs thereon, all of which he neglected and refused to do, and thereupon and therefor the defendant repudiated the contract, and abandoned the premises before the 15th day of August last, and gave notice thereof to plaintiff; but the doing of the repairs was not a condition of the leasing." The court excluded this evidence; the defendant excepted, and brings the case here by appeal. The exclusion of this evidence is the only point in the case.

In the opinion of this court, the evidence was properly excluded. The defendant offered to prove that he entered into the premises under an agreement that he should have a lease therefor for three years. What does the proof amount to? Is it any thing more than a parol lease for three years? Under the statute of frauds what is the effect of such a lease? It is to create a tenancy from year to year. In this case then the defendant, under his own proof, as offered, would be liable to one year's rent, unless he surrendered the premises to plaintiff and they were accepted by him, and the contract between them put an end to. But surely the defendant, under

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such an agreement, can not enter and afterwards abandon the premises at will, and escape liability for rent. (Kerr v. Clark, 19 Mo. 132.) Let the judgment be affirmed; Judge Scott concurring.

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FREMONT, Defendant in Error, v. CITY OF CARONDELET, Plaintiff in Error.

1. A writ of error will be dismissed for the reason that it is left blank as to the names of the parties to the suit.
2. No amendment of such writ can be allowed in the Supreme Court.

Error to St. Louis Land Court.

Casselberry, for plaintiff in error.

Reber, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

This case stands on a motion to dismiss the writ of error for the reason that the writ does not show in what cause it issued, and no parties, plaintiffs or defendants, are named therein. The error is apparent, and the plaintiff in error moved to amend the writ.

Amendments are liberally allowed in affirmance of judgments, but this last motion by an amendment would pave the way for a reversal of a judgment. There is no warrant for this at common law, nor by any of our statutes on the subject of amendment. Tidd (p. 1094) says: "Great certainty was formerly required in making the writ of error agree with the record, for, as the writ was the sole authority by which the judges were empowered to act, they could proceed only on that record which the writ or commission authorized them to examine. Nor could any defects therein be amended before the statute of 5 Geo. I. c. 13, because by the former statutes of amendment the judges were only enabled to amend in affirmance of the judgment." In looking into our legisla-

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tion on this subject, we find that the statute of Geo. I. was adopted into the code of 1825. (R. C. 1825, p. 130, 131.) In subsequent revisions this act has been omitted, and thus we are left without a statute on the subject. Under these circumstances we do not conceive that we would be warranted in allowing the amendment. We can find no authority for such an act either by the common law or by statute. Writ dismissed ; Judge Ryland concurring ; Judge Leonard absent.

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CHARPIOT, Respondent, v. SIGERSON, Appellant.*

1. The possession that will be deemed such a part performance of a parol contract for the sale of land as will take the case out of the statute of frauds is an actual possession taken by the vendee under the contract, with the consent of the vendor, and with a view to the performance of the contract, and not the constructive possession which the law imputes to the owner when there is no actual adverse possession in a stranger.
2. In order to take a case out of the statute of frauds on the ground of a part performance of a parol contract for the sale of land, the acts relied on should be definite and referable exclusively to the contract, and the contract itself should be fully established in all its essential terms.

Appeal from St. Louis Land Court.

This was an action to enforce specific performance of a contract of sale of land. Issues were framed and submitted to a jury, and the following, among other instructions, was given to the jury : "1. Possession of the land in question, as mentioned in the pleadings, may be either actual or constructive. Actual possession needs no explanation ; it may be seen there for itself. It may be with or without inclosures, buildings or cultivation. Constructive possession is different ; as where a man has title to land, though it be wild and untenanted, if no person have actual, adverse possession, the

* This cause was decided at the October term, 1856. A motion for a re-hearing was filed and continued to the March term, 1857. The motion was overruled.

25	63
36a	314
25	63
103	194
25	63
45a	627
25	63
170	*701

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law imputes the possession to the rightful owner. Also where a man has good title to land (no other person being in adverse possession) and exercises over it such acts of ownership as men do ordinarily exercise over their wild and untenanted lands, the law regards such acts of ownership as good evidence of possession on the part of the claimant."

The jury found "that the contract, as stated in the petition, was made verbally and confirmed in writing; that defendant had notice of such contract before the making of the deed from James Sigerson [the vendor] to John Sigerson, the defendant; that James Sigerson did surrender the ground in dispute to the plaintiff, and the plaintiff did take and keep possession thereof as stated in the petition." The court rendered a decree for plaintiff.

W. L. Williams, for appellant.

A. J. P. Garesché and Primm, for respondent.

LEONARD, Judge, delivered the opinion of the court.

We reverse this judgment on account of the instruction in reference to possession. In applying the equity of specific performance to real estate, there is a modification of a rule of statute law, which at first sight appears inconsistent with it, and repugnant to the maxim that "equity follows the law." The modification to which we refer is that of enforcing parol contracts relating to land on the ground that they have been already performed in part. The wisdom of allowing this deviation from the written law has been much doubted, but the doctrine is too firmly established by precedent, wherever English equity law prevails, to be now called in question. The only difficulty is in determining what shall be considered part performance. At one time the payment of the purchase money, or even of a part of it, was considered such; but that doctrine, after being the subject of a good deal of discussion, has, it is believed, been finally overthrown.

The principle of part performance is said to be that, if one of the contracting parties induced the other so to act that if

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the contract be abandoned he can not be restored to his former position, the contract must be considered as perfected in equity, and a refusal to complete it at law is in the nature of a fraud. Such would be the case where, upon a parol agreement for the purchase of land, the vendee, not being otherwise entitled to the possession, is admitted into it by the seller ; for if in such case the contract be invalid, he is made a trespasser, and is liable to answer as such at law ; and the equity is stronger, if, after being let into the possession, he is allowed to lay out his money in improvements upon the land. In order however to render the change of possession a sufficient part performance, it is essential that it should have been made with a view to the agreement being performed. Hence, if the change of possession was independent of the contract, or was obtained wrongfully by the vendee, or even without the consent of the vendor, it is not a part performance.

Supposing the parol contract to have been established by the proof, the turning point in that case was, whether there had been such a change of the possession as would take the contract out of the statute of frauds ; and the court directed the jury that this possession, such as would be sufficient for this purpose (for that was the possession about which the issue was made), might be either actual or constructive, and that constructive possession was that which the law imputed to the owner, when there was no actual adverse possession in another. This is an obvious error. The possession that will be deemed a part performance of a parol contract is an actual possession, taken by the vendee under the contract, with the consent of the vendor, and with a view to the performance of the agreement, and not the fictitious possession which the law imputes to the legal ownership when there is no actual adverse possession in a stranger, and which passes from one to the other upon every transfer of the legal title. Indeed the only definition given by the court of constructive possession utterly excludes the idea that the plaintiff had such a possession of the land in controversy ; yet the instruction may have misled the jury, and as it relates to a material point in the

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case, we can not treat it as a harmless, although incorrect, ruling of the law.

It was argued before us that there was not sufficient evidence of the contract in all its terms to submit that question to the jury. The judgment being reversed for the error in the instructions, there will be a new trial of all the issues, and we therefore refrain from expressing any opinion in reference to the sufficiency of the evidence, but will take occasion to remark, that, in order to take a case out of the statute of frauds on the ground of part performance of a parol contract, the acts relied upon for this purpose should be definite and referable exclusively to the contract, and the contract itself should be fully established in all its essential terms. It is said that in former times judges felt themselves at liberty to depart from this reasonable course of adjudication, and granted relief notwithstanding the uncertainty as to the terms of the contract. This latitude of jurisdiction however is not warranted by any sound principle, and has been expressly renounced in more recent times. The judgment is reversed, and the cause remanded.

25 66
45a 18
25 66
57a 470
59a 995

PFEIFFER, Plaintiff in Error v. KINGSLAND *et al.*, Defendants in Error.

1. An agreement guarantying the performance of a contract previously entered into with another, though in writing, must have a consideration to be valid and binding.

Error to St. Louis Court of Common Pleas.

This was an action upon the following guaranty, bearing date October 27, 1832: "We agree to guaranty that Mr. M. Drummond will do all that he says he will do in building machinery for a two horse grist-mill for Mr. Pfeiffer. [Signed] Kingsland & Cuddy." Drummond had agreed, August 4, 1852, to build and finish for Pfeiffer the machinery for a two

Pfeiffer v. Kingsland.

horse grist-mill. The plaintiff failing to show any consideration for said guaranty moving between himself and defendants, the court excluded evidence tending to show a breach of the original contract on the part of Drummond. The court instructed the jury that upon the evidence the plaintiff could not recover; whereupon plaintiff took a non-suit, with leave to move to set the same aside.

Kribben, for plaintiff in error.

I. The defendants do not set up a want of consideration in their answer, but defend upon the main merits of the case. (See generally 8 Johns. 29; 1 Parsons on Cont. 496; 2 Hall, 474; 17 Johns. 113; 2 McLean, 103; 5 Bingh. 113; Roberts on Frauds, 117; 2 Co. Rep. 2 Atk. 560; 1 Chitty Pl. 71; 2 Bingh. 464; 1 McLel. & You. 205.)

Hitchcock and *Gibson*, for defendants in error.

Scott, Judge, delivered the opinion of the court.

A sufficient consideration, or recompense, or motive, or inducement, to make the promise upon which a party is charged is of the essence of a contract not under seal except in cases where the statute law has introduced a different rule. A promise by a party, even in writing, to pay a debt already incurred by a third person is not available if there be no new consideration. An undertaking to answer for the debt of another, though in writing, is void if no consideration move between the plaintiff and defendant, either of forbearance or otherwise. A guaranty of a note, like any other promise, without a consideration, is void. But if the undertaking is coterminous with the creation of the original debt, the guarantor is presumed to participate in the original consideration. (*Leonard v. Vredenberg*, 8 Johns. 29.) It is entered of record "that it is agreed that Drummond proved that no consideration passed between plaintiff and defendants for the guaranty sued on." The guaranty was not made until the time of performing the act guarantied was about to expire, long after the original contract had been made. There

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is no evidence showing that after the date of the guaranty the plaintiff paid any money to Drummond on the faith of it ; had such been the fact the case might have been different. It appears that all the money Drummond received was paid to him before the date of the guaranty. If any money was due Drummond he had a remedy in his power for any breach of contract on the part of Drummond. Judge Ryland concurring, the judgment will be affirmed ; Judge Leonard absent.

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KRUSE, Appellant, v. KRUSE, Respondent.

1. The complainant in an action for divorce must be a resident of this state, otherwise the petition may be properly dismissed.

Appeal from St. Louis Circuit Court.

This was an action for a divorce brought by the wife against the husband for wilful desertion and absence without reasonable cause for two years. The plaintiff proved, as appeared from the bill of exceptions, "that she was married to the defendant, in the county of St. Louis, on the 15th day of October, 1852; that, after living together a few months in said county, the defendant left the plaintiff, without any cause therefor being made to appear, and went to California, and has since done nothing for her support or maintenance, nor had he since been heard from, except as one of the witnesses stated he had heard in 1855 that he had returned to this state, but that he had not seen him; that on being thus left the plaintiff took up her residence with her father, who has since supported her; that after having thus lived with her father some fifteen or sixteen months, she with her father removed to Kentucky, where she has ever since resided with her father."

Upon the foregoing facts the court dismissed the petition on the ground, 1st, that the plaintiff had not resided in the state of Missouri for one whole year next before the filing of

Kruse v. Kruse.

her petition ; 2d, that she had ceased to reside in this state before the alleged desertion had existed for the space of two years.

Krum & Harding, for appellant.

I. The appellant did not lose her residence in this state by going with her father to Kentucky. No intention to abandon her residence can be inferred from the evidence. (5 Yerg. 203.)

II. Even if she had lost her residence here, the fourth section of the act of 1845, concerning divorce and alimony, (R. C. 1845, p. 427,) gave her the right to sue, because the "offence complained of was committed within this state." Under this point the appellant contends, 1st, that desertion is a complete act at the instant when the husband or wife first leaves the deserted party with the intention to abandon and not return to him or her ; 2d, that the period of two years, named in the statute, is not fixed as determining what desertion is, but is simply a prohibition to the injured party to sue until the desertion has continued during that time ; 3d, that the manifest reason for requiring the delay is to afford the guilty party a *locus penitentiae*, and to prevent action by the injured party until all reasonable probability of condonation has passed ; 4th, in this particular case more than three years had elapsed between the time of desertion and the time of the filing of the plaintiff's petition ; 5th, the statute does not require that the injured party should reside here during the term of two years referred to, in order to make his or her cause of action complete ; 6th, the offence or injury was committed in this state, if at all.

SCOTT, Judge, delivered the opinion of the court.

This was a petition for a divorce instituted in the St. Louis Circuit Court on account of desertion and absence. Although the plaintiff may have been married in this state, yet that circumstance of itself does not entitle her to sue in our courts for a divorce. It appears from the evidence in the cause that

Beck v. Metz.

the plaintiff was a non-resident of this state when she instituted this suit, and that she continued so up to the time of the trial of the cause. The second section of the act concerning divorce and alimony, (R. C. 1845,) under which this proceeding was begun, clearly shows that the plaintiff must be a resident of this state. Judge Ryland concurring, the judgment will be affirmed; Judge Leonard absent.

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**BECK, BY GUARDIAN, Defendant in Error, v. METZ & WIFE,
Plaintiffs in Error.**

1. A will, after a devise to the wife of the testator of all his property, contained the following clause: "In every other respect I leave it entirely to the will and judgment of my said wife Catherine, how and in what manner she thinks proper to dispose of the estate, as well with reference to our child or children as with reference to the said Joseph Frederick Beck." The testator left one child him surviving. *Held*, such child was *named* in said will within section 11 of the act concerning wills; (R. C. 1845, p. 1080;) that consequently the testator did not die intestate as to such child.

Error to St. Louis Land Court.

Kribben, for plaintiff in error.

Whittelsey, for defendant in error.

- I. The second clause of the will gave to the wife the absolute estate, "to her and her heirs and assigns forever." The fourth clause gave her the same estate, for it gave her the absolute power over the estate. A devise with power to pass a fee passes a fee. (*Doe d. v. Hendland*, 8 Cow. 277.) "My estate to be at her absolute disposal" passes a fee. (*Jackson v. Babcock*, 12 Johns. 389.) The power of appointment did not limit the fee. (3 Ed. Ch. R. 207.) Without the fourth clause naming his daughter, the will would have been inofficious under the statute; but as he has named her, and still gave his wife the estate, the will is valid, and the wife took all the estate. (*Guitar v. Gordon*, 17 Mo. 408; *Tucker v. Boston*, 18 Pick. 167; *Terry v. Foster*, 1 Mass. 166; *Wil-*

Beck v. Metz.

der v. Goss, 14 Mass. 357; Wilson v. Tasket, 6 Metc. 600; Block v. Block, 3 Mo. 594.) These authorities show that the statute applies only to unintentional omissions of the testator to provide for his children.

RYLAND, Judge, delivered the opinion of the court.

Frederick L. Jesser died seized of certain real estate in St. Louis city. By his last will and testament he devised to his wife Catherine his estate, using the following language: "Second, I hereby grant, give, and bequeath to my wife Catherine, all and singular, my property and estate, real, personal and mixed, including all I possess at present, and whatsoever I may become possessed of or acquire hereafter: to have and to hold the same unto her, my said wife Catherine, and to her heirs, administrators and assigns, forever, free from all claims and to the exclusion of all persons whatsoever." The fourth clause of said will is as follows: "In every other respect I leave it entirely to the will and judgment of my said wife Catherine how and in what manner she thinks proper to dispose of the estate, as well with reference to our own child or children as with reference to the said Joseph Frederick Beck." His wife Catherine was left sole executrix of the will. Louisa P. Metz, the wife of Frederick Metz, was the sole child of Jesser by his wife Catherine. Catherine Jesser died intestate, leaving as her heirs the plaintiff Joseph Frederick Beck, her son by a former husband, and the said Louisa P. Metz, her daughter by said Jesser.

The question here arises alone upon the construction of these two clauses in the will. There can be no doubt that without the fourth clause Jesser would be considered as having died intestate as to his daughter. But the effect of this fourth clause is the point before us. In Bradley et al. v. Bradley et al., decided at Jefferson city, 24 Mo. 371, the doctrine about the failure to mention or provide for children in the testator's will was before this court. There the testator said nothing by his will from which this court could infer that he

Connor v. Eddy.

had a child. We think here the fourth clause mentions his child in sufficient manner to take this will without the 11th section of our statute of wills. (R. C. 1845.) The testator expressly mentions his child—"as well with reference to our child." They had but one, the daughter. The wife had one by a former husband; even he is named. Now this mentioning his child and the giving the power to his wife to provide for this child by disposing of the estate according to her own judgment, must be considered within the spirit of our statute, as a naming or providing for his child. He can not be said to have omitted to mention his child. True he did not name her by her name, but she is sufficiently designated, they having but a daughter. *He says, "our child."* Here she was before him—fully in his mind—called "our child." He knew the mother would do her part by her, and to the judgment of the mother he willingly trusted. We refer to the opinion in Bradley v. Bradley, just cited, and consider it not necessary to again cite the authorities therein commented on. Here we see the testator had a child—the will shows this; and whenever the child is designated, or so pointed out by the will that the court can see the testator had the matter fully before his mind, we are inclined to think it will answer. This being the only point, and the court below having considered properly that the will passed the property in fee to the wife, we must affirm the judgment; Judge Scott concurring; Judge Leonard absent.

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CONNOR, Appellant, v. EDDY *et al.*, Respondents.

1. Where a purchaser of land accepts from his vendor a conveyance with full warranty of title, there being no fraud in the sale, and the possession of the purchaser remaining undisturbed, he can not be relieved against the payment of the purchase money on the mere ground of a defect of title.
2. Where a purchaser of land executes a deed of trust, with warranty of title, to secure to the vendor the payment of the purchase money, he is not estopped by his warranty to avail himself of any relief to which he would otherwise be entitled by virtue of the vendor's covenants to himself.

Connor v. Eddy.

Appeal from St. Louis Land Court.

The petition in this cause sets forth substantially that plaintiff Connor became the purchaser, at a sale by Joseph A. Eddy and Jabish B. Eddy, of certain lots in a subdivision of a tract known as the Sarpy arpenter; that the said Eddys conveyed the same to plaintiff by deed with general warranty; that by deed of the same date plaintiff conveyed said lots to Messrs. Belt & Priest (also made defendants herein) in trust to secure the purchase money unpaid, for which he had executed and delivered three several promissory notes; that in their handbills and publications of sale, and also at the time of sale, the title of the Eddys was declared to be undoubted and perfect; that he, plaintiff, purchased relying upon said representations; that in these representations gross fraud was practiced upon plaintiff inasmuch as the title of said Eddys is neither undoubted nor perfect; that said Eddys have not a perfect title to more than one-seventh of said land; that the remaining six-sevenths are claimed by one Gustavus W. Dreyer; that said Dreyer has instituted in this court proceedings to enforce his rights; the writ issued in said proceedings was served on Jabish E. Eddy, September 23, 1854, two days before the day of sale at which plaintiffs purchased; that said writ was served on Joseph A. Eddy, September, 1854, two days after said day of sale, and before the execution of their deed of conveyance to plaintiff; that defendants studiously concealed the knowledge of these facts from plaintiff, that thereby he might be induced to complete his purchase; that by reason of the notoriety now given to the proceedings of the said Dreyer no confidence is held in the title of said Eddys; that he can not therefore sell or dispose of it, and consequently that it is utterly valueless to him, as it would not be prudent that he should build or improve upon it; that he has demanded a rescission of the contracts, but defendants will not consent; he "therefore prays for relief, that, having no adequate remedy at law, the contract be rescinded; that defendants surrender to him their notes by him given to them,

Connor v. Eddy.

and refund to him the amount of his purchase money, \$125, and interest and costs."

The court made the following finding of the facts: "That there had existed difficulties in the title of the Sarpy arpent; that the defendants, Eddys, as owners of the property, on the 25th of September, 1854, sold a number of lots in the Sarpy arpent, at which sale plaintiff purchased the lots as described in the petition; pursuant to the terms of the sale plaintiff paid one-fourth of the purchase money down, and for the balance gave his three notes, all bearing interest from date, and payable respectively at one, two and three years; that plaintiff accepted a deed with full warranties from the defendants, Eddys, and their wives; and he and his wife executed a deed of trust to defendants, Belt & Priest, to secure the notes for the balance of the purchase money, with full covenants of warranty; that though these deeds were executed afterwards, they both bear date of the sale, viz., September 25th, 1854, and were delivered October 4, 1854. The court doth further find that there had been difficulties about the title of the Eddys to the land in question; that in their advertisements and placards Belt & Priest, the auctioneers, (defendants,) by the authority of the Eddys, published the title of the latter to be perfect and undoubted; and furthermore, that at the sale Belt (defendant) published that all the difficulties about the title were now at rest, having been carried to the Supreme Court and adjudicated in favor of the Eddys. And the court doth further find that before the sale suit was brought in this court by Dreyer against the Eddys; that service was had in said suit on Jabis P. Eddy two days before, and on Joseph A. Eddy two days after the day of sale; that no knowledge of this suit was ever given by defendants to plaintiff; that this suit of Dreyer v. Eddy et al. was before the filing of the amended petition in this cause dismissed, plaintiff Dreyer taking a voluntary non-suit. And the court doth further find that the notoriety of the suit by Dreyer and his claim to the title to a portion of the land has impaired the value of the property in dispute by inspiring a general distrust of the title; that by general repu-

Connor v. Eddy.

tation there were doubts as to the title of said Eddys to said land at the time of the sale arising out of said suit by said Dreyer. No evidence as to the validity of said title was offered by either party. The court further finds that the defendants were not guilty of any fraud in the premises. Upon the foregoing facts, that the defendants are entitled to recover; judgment accordingly."

A. J. P. Garesché, for appellant.

I. Plaintiff has no adequate remedy at law. The assertions that defendants had "a perfect and undoubted title," and that "the difficulties had been settled by having been carried to the Supreme Court and there adjudicated in favor of the owners," are untruthful assertions. The concealment of the fact of the institution of suit by Dreyer constituted a fraud upon the plaintiff. He is entitled to a rescission of the sale.

Krum & Harding, for respondents.

SCOTT, Judge, delivered the opinion of the court.

This case stands for revision here on the finding alone. No failure of title in the vendors is shown by the finding, and it is expressly stated that there was no fraud in the defendants in making the sale. Where is the ground then for a rescission of the contract, or for an injunction to restrain the collection of the purchase money? The facts as found do not bring the case within the influence of the act to regulate injunctions in certain cases. (R. C. 1845, p. 582.) It must stand then on the general principle that a purchaser of land, who has taken a conveyance with covenants for title and is in undisturbed possession, will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud in the sale nor any eviction. (Abbott v. Allen, 2 Johns. Ch. 519.) Nor is there any allegation of the insolvency of the vendors or of any equitable circumstance, which, according to the case of Jones v. Stanton, 11 Mo. 433, might induce a departure from the general principle.

The plaintiff, having given a deed of trust on the lot with

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covenants for title to secure the purchase money to the vendors, is not estopped by his covenants from availing himself of any relief to which he would otherwise be entitled by virtue of the vendor's covenants to himself. This is the law with regard to mortgages with warranty of title given to secure the purchase money of the land mortgaged, and it is as applicable, if not more so, to deeds of trust for the same purpose. The law of estoppel has no application in such cases. (Rawle on Cov. 348.) Judge Ryland concurring, the judgment will be affirmed; Judge Leonard absent.

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STEAMBOAT VIRGINIA, Respondent, v. KRAFT *et al.*, Appellants.

1. The custom or usage authorizing those engaged in the transportation of merchandise to advance to forwarding agents the existing charges thereon, and to hold the consignees and owners liable therefor, does not extend to or cover advances made on demands upon the consignees or owners wholly foreign to, and disconnected with, any cost or charge for transportation.

Appeal from St. Louis Law Commissioner's Court.

One Whiting, acting as a forwarding merchant in New Orleans, shipped for St. Louis, per the steamboat Virginia, five cases of scythes. When said goods were received on board of said steamboat, the said Whiting demanded and the clerk of said steamboat paid to said Whiting the sum of \$153 42. Said sum was entered as "charges" in the bill of lading. Of said sum of \$153 42, a portion—\$147 92—formed no part of the charges paid by or due Whiting on account of the said merchandise shipped on the Virginia; it was a charge made by Whiting on account of former advances, travelling expenses, lawyer's charges for collecting, &c. The merchandise shipped by said Whiting as forwarding agent was delivered to E. F. Kraft & Co., the owners thereof, at St. Louis, who refused to pay to said steamboat the said item of \$147 92, alleging that they were not liable therefor, but admitting their

Steamboat Virginia v. Kraft

liability to the extent of the remaining advances. This suit was brought in behalf of said steamboat to recover said sum of \$153 42.

The court, at the instance of the plaintiff, gave the following instructions: "1. The custom or usage of a particular trade fixes the liability of parties, unless there is an agreement to waive the ordinary custom or usage of the trade in which the contract is made. 2. If the jury believe from the evidence that it is customary for boats running between New Orleans and St. Louis to receive goods in New Orleans and pay charges thereon without knowing the consideration for these charges, and that the plaintiff in this case received the defendants' goods in New Orleans and paid to the defendants' agent there the sum of \$153 42 as charges on the same, without knowing what those charges were for, then they are entitled to recover the amount paid, although the jury may believe that the whole amount of said charges were not properly chargeable on that particular lot of goods for previous freight, or the ordinary charges incurred in the transportation of the same. 3. The acts of the defendants' agent in New Orleans are binding upon them, and they are liable for money received by him for and on their account, notwithstanding the same may have been improperly charged by the said agent, unless the plaintiff knew the charges were improper, and the burden of proving that fact lies on the defendants. 4. The defendants had their choice to receive or to refuse to receive the goods on their arrival here; but by receiving the goods without any objection to the charges on the same, they admitted their liability, and are now bound to pay the full amount of said charges, whether the same were properly charged or not by their agent in New Orleans, unless the jury find from the evidence that the plaintiffs knew before they paid said charges that they were improper, and were not the ordinary and usual charges incurred in the transportation of the goods in question. 5. If the jury believe that Abijah Whiting was the shipping agent of the defendants in New Orleans,

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and that acting in that capacity for the defendants he procured the said plaintiff to pay the sum of \$153 42 as charges on the goods of the said defendants, and that the said defendants received the goods knowing that said charge had been paid by the plaintiff, then they are liable therefor, and the jury will find for the plaintiff."

The court refused to give the following instructions asked by defendants: "1. The jury are instructed that the plaintiff is entitled to recover in this action of defendants only such sums as they find were paid out on account of freight and charges on the said five cases of scythes named in the bill of lading. 2. If the jury believe that the sum of \$147 92, or any other sum paid by plaintiff to Whiting, was collected by said Whiting on account of other transactions than those connected with the shipment and charges on said scythes, then they will not find for plaintiff for such amount."

The jury returned a verdict for plaintiff for the whole amount sued for.

Biddlecome, for appellant.

I. Whiting was in no sense the agent of the defendants either by delegated power or from authority incidental to the particular business or employment in which he was employed. He was only a forwarding merchant, and had no right to collect of the carrier of the goods any other moneys than such as he had paid out upon, and might properly charge for his services in connection with the particular goods forwarded. The payment by the officers of the plaintiff to Whiting was voluntary, and without authority and without consideration to the defendants, except as to the sums advanced, and forwarding charges upon the goods consigned. The receiving of the goods by the defendants did not subject them to the payment of any other sums than such as were incident to the transportation of the goods. The lien of the carrier on goods does not extend beyond his own freight and that which he has advanced for former charges and costs of transportation on the same. He may be subrogated to the rights of the for-

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warding merchant or shipper in the lien which he had, but can obtain no rights against the goods beyond that. The custom attempted to be shown creates no liability against defendant.

A. M. Gardner, for respondent.

I. The money was paid innocently by plaintiff to defendants' agent, and if he had no right to receive the same, defendants and not plaintiff should suffer the loss. (Story on Agency, § 442, 451.) As agent, consignor or forwarding merchant for defendants, Whiting was authorized to make the contract contained in the bill of lading, and by which defendants are now bound. (Edwards on Bail. 499.) The plaintiff followed the custom of the trade in paying the charges specified in the bill of lading without inquiring as to the consideration therefor. (Ruggles v. Washington Co. 3 Mo. 348; Edwards on Bailment, 510.) The charges were paid to the forwarding merchant having the goods in possession, for the purpose of making freight for the vessel, according to the usage of the trade, and should be refunded. (Flanders on Maritime Law, 180.)

SCOTT, Judge, delivered the opinion of the court.

In the case of White v. Vann, 6 Humph. 73, the court said it was "proved by several enlightened merchants and well-informed owners of steamboats, that it is the long and well established custom and usage of trade, not only on the Tennessee river, but throughout the United States, for freighters of goods to advance to the forwarding agents the existing charges upon them, which the consignees and owners are liable to refund; that this usage is indispensable to the successful prosecution of commercial operations, and of great and mutual advantage to all parties." We have copied the above extract as showing the usage, because upon examination we have not been enabled to find much, if any thing, in relation to it. The advantages resulting from this usage are so obvious that it must commend itself to every one; and we

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should regret to see it a stranger to our courts. But advantageous as this usage is shown to be, we do not know, nor can we conceive any thing that would more effectually render it odious than such an extension of it as would make it cover advances for claims or demands on the owner or consignees wholly foreign to and disconnected with any cost or charge for transportation. If this were tolerated, not only the forwarding agent, but every one who would collude with him, might obtain payment of demands, whose justice the owners or consignees refused to recognize. It would be the introduction of a novel mode for the collection of debts where payment had been denied on the ground of their invalidity, and a means of compelling the owner to submit to unjust exactions or to refuse him his goods.

As the debt paid by the plaintiff through her agent was in nowise incurred by, nor in any way connected with, the transportation of the merchandise, she could not by such voluntary payment, unsupported by any usage, make herself a creditor of the defendant. Nor can the officers of the plaintiff, by any custom or usage, protect her from the consequences of their neglect in not ascertaining whether their advances were the costs of transportation. Would they advance any amount, however enormous, and expect to save her from loss by a usage which did not require them to ascertain the validity of the charges? A custom to encourage negligence at the expense of others would scarcely be tolerated by the law. Being familiar in the business of transporting merchandise, if the items of the charges were produced and examined, the agent could see at once whether they were usual and proper.

The principle that, where one of two innocent persons must suffer by the act of a third, he should bear the loss who has placed it in the power of the third person to do the injury, has no application here. The plaintiff is not an innocent party. Her agents were guilty of gross negligence in not informing themselves of the nature of the charges for which they made an advance. There is no pretence in the circumstances of the case to warrant the instruction to the effect that

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the defendants, by receiving the goods, acknowledged the justice of the charges, and were liable to pay them, unless the plaintiff, when she advanced them through her agent, knew that they were not the ordinary and usual charges incurred in the transportation and shipment of goods.

As the charge was illegal and unjust; as there was no evidence that the defendants were aware of its nature when they received the goods; as they objected to it so soon as it was known; and as they could not contemplate that an improper charge would be made against them, there is no foundation for the presumption that they acquiesced in or acknowledged the justice of the plaintiff's demand. The defendants, upon tendering the legal advances, would have been entitled to the possession of their goods, and might by an action have compelled their delivery. As they have them lawfully without suit, there is no reason why they should be placed in a worse situation than if they had obtained them by suit. The other judges concurring, the judgment will be reversed, and the cause remanded.

WESSON *et al.*, Respondents, v. HORNER *et al.*, Appellants.

1. To constitute an enforceable contract it must be founded on a valuable consideration, and be certain and definite in its terms.

Appeal from St. Louis Court of Common Pleas.

This was a suit by attachment founded on a promissory note. The answer admitted the execution of the note, but alleged by way of defence, in substance, that the plaintiffs and defendants, and divers other creditors of defendants, consulted together in relation to the indebtedness of the defendants to the plaintiffs and the other creditors; that it was understood and agreed between the defendants and those other creditors that they would forbear and give time to defendants to pay the several debts owing to them, and would sell them goods

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to enable them to prosecute their trade and business as merchants, provided the plaintiffs would not annoy, harass and disturb them, or in any way prevent them from so doing; that the plaintiffs agreed that if said creditors would sell goods to defendants, they would not sue, attach, or in any other way detain or harass them in prosecuting their business as merchants; that divers of these other creditors did sell defendants goods on credit to the amount \$8000, the sales being based on said agreement, and with the understanding that the plaintiffs would not sue, or in any way harass the defendants; that this suit was in violation of the agreement. Defendants pray that proceedings may be restrained until a reasonable time has elapsed to enable them to dispose of said goods.

A motion was made and sustained for judgment as for want of an answer.

Hudson & Thomas, for appellants.

N. Holmes, for respondents.

I. No agreement is stated in the answer with such certainty as to be capable of being interpreted and enforced against the plaintiffs. It does not definitely appear between what parties the several supposed agreements were made, nor on what considerations, nor from and to whom moving, nor when to be performed. So far as the plaintiffs are concerned the agreement stated is *nudum pactum*, and void for want of any valuable consideration. A moral consideration is not sufficient. Forbearance to sue for a reasonable time may be a valuable consideration for a promise, but here defendants do not promise any thing whatever for the benefit of the plaintiffs, nor is the agreement to forbear, here stated, for any particular time, nor for a reasonable time, but is wholly indefinite.

RYLAND, Judge, delivered the opinion of the court.

The agreement set up in the defendants' answer amounts to no defence to the plaintiffs' action. There is not the

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slightest consideration set forth or mentioned moving to plaintiffs for any such promise or agreement; it is a mere *nudum pactum*. The agreement is uncertain and entirely too indefinite even if there was a consideration to support it. The defendants do not promise to do any thing for the plaintiffs' benefit. It seems to us to be a mere sham answer. There is no defence to plaintiffs' action set forth in the answer. The promise, if any was made, seems by the manner of stating it to have been made, not to defendants, but to the other creditors of the defendants. There is nothing in this case. The judgment must be affirmed; the other judges concurring.

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MEYER, Respondent, v. WITTER, Appellant.

1. To make the contents of a document—a periodical publication—in a foreign language evidence, it must be translated, and be brought home to the party against whom it is sought to be used.

Appeal from St. Louis Court of Common Pleas.

S. A. Holmes, for appellant.

I. Under the issues and the instructions of the court below, the allowance of the defendant's offset depended upon the proof of the fact of partnership between the plaintiff and Bibliographic Institute of Hildburghausen, and it was therefore error in the court to exclude any evidence tending to prove that fact. The identity of the publication was established by the testimony of Schuster, and there being evidence offered by the defendant tending to show that Meyer was one of the publishers, the translation from the prospectus ought to have gone to the jury for what it was worth. They were the proper judges as to whether Meyer was the publisher or not.

II. The point taken by the respondent, that the publication called the "Leuchtkugeln" was in the German language, is

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not well taken. The defendant did not offer the contents but the *thing* in evidence.

III. That part of the contents of this book, consisting of the prospectus, which was offered in evidence by the defendant, was properly translated and the translation proven. Where a party offers a book in evidence, he is not obliged to read the whole of it. The plaintiff might have called for a translation of the remainder had he himself desired to read it in evidence.

IV. It is objected that there is no evidence that the "Leuchtkugeln" offered by the defendant ever came from Meyer. There was evidence tending to show that Meyer was the publisher of this work, and that Witter was his agent and factor for the sale of it; that consignments of the work, with prospectus, had been made to him. Under these circumstances, it would seem to be enough that the defendant produced from his possession a copy of the work and identified it as genuine.

Hill, Grover & Hill, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This was an action brought by Meyer to recover of defendant Witter the sum of seven hundred and sixty-four dollars and thirty-two cents, alleged to be due from Witter to plaintiff, on account of goods, wares and merchandise sold and delivered by plaintiff to Witter at his request. A particular statement of the account is filed with the petition, showing debits, and credited with the amount of \$1806 43. The debts amounted to \$2570 75—leaving a balance due to plaintiff of the sum of \$764 32.

The answer of Witter denies all indebtedness; and he also pleaded a set-off due to him by a firm of which he alleges the plaintiff is a member. The set-off amounted to \$827 89. Defendant admits the correctness of a part of plaintiff's debt, amounting to \$684 47; leaving a balance of \$143 42 due from plaintiff to defendant. The plaintiff proved his case by

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a witness who stated that the defendant in his presence admitted the account shown to him by plaintiff containing all of the items as set forth in the account filed, and also the amount of credits, leaving the balance as stated in the petition ; and that defendant promised to call at the plaintiff's store and pay it, or arrange it before he left the city of New York. The witness proved that the amount of \$764 40 was distinctly admitted as the difference between the plaintiff's and defendant's accounts ; and it was distinctly agreed at the time that that was the actual amount due from defendant to plaintiff. It was also proved that the plaintiff was not a member of the "Bibliographic Institute"—the firm that defendant in his set-off claimed to be debtor to him—and that plaintiff was a partner thereof; and also proved that the Bibliographic Institute never had any connection with the house or business of the plaintiff, except that plaintiff bought books of the Institute as other book-sellers buy, and occasionally attended to a few small matters of business for the Institute in New York by way of convenience and good feeling ; that plaintiff's house never was a branch of the Institute.

The defendant gave much testimony for the purpose of establishing the issues set up in his answer, and all the evidence offered by him was admitted except the copy of the "Leuchtkugeln," and a partial translation thereof. A witness for defendant testified that he knew the publisher, and had heard it was published by a man named Roller, in Munich ; but did not know of his own knowledge by whom it was published. Defendant then offered to read in evidence a translation of the first page of said publication, which was as follows :

"*Leuchtkugeln.* Vol. 8—No. 1. Address of the new editors. 'To meet again' was the last word on the last sheet of this journal, and the last hope of its brave founder. The latter has been promptly fulfilled. The 'Leuchtkugeln,' transferred to our publishership, continue to shine. Under the shield of our firm the journal obtains homeright and the largest circulation in both the hemispheres, and by it security

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of its subsistence. May the 'Leuchtkugeln' at their continued publication be received everywhere by the people with the greeting of welcome.

"Hildburghausen: Bibliographic Institute. New York: Herman J. Meyer."

The publication thus offered and excluded is a magazine in the German language, mutilated and without date. No evidence was offered by defendant tending to show where it came from, or how the defendant became possessed of it. The evidence before offered showed that plaintiff had sent to the defendant for sale works of that name, "Leuchtkugeln," and had charged them in his account in 1852; but there was no proof tending to connect plaintiff with this particular paper or document. The only question before us is as to the rejection of this German paper and the translation of a part of it as evidence. In our opinion, the document was properly rejected; there is nothing connecting the plaintiff with this document; no proof that he had ever before seen it, or had any thing to do with it. The document is mutilated and without date. It was not translated, and if the object was to make the contents evidence to the jury, it must be translated. If it be the object only to show the paper itself—the document without any reference to its contents—it is not competent for that purpose without previously by other testimony bringing it home to the plaintiff, and in some way connecting him with it. This was not done in this case. We therefore conclude that the court properly rejected the document when offered in evidence. This action of the court is the only matter complained of here. We therefore affirm the judgment; the other judges concurring.

KEATING, Respondent, v. BRADFORD, Appellant.

1. It can not be assigned for error that a new trial was improperly granted.
2. The Supreme Court will not interfere with the verdicts of juries on the ground that they are against the weight of evidence.

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Appeal from St. Louis Law Commissioner's Court.

Spies & Burt, for appellant, cited Cummins v. Walan, 4 Blackf. 307; Dense v. Worrell, 1 Hall, 382; Mann v. Clifton, 3 Blackf. 304; Coe v. Given, 1 Blackf. 367; Strange, 691; Cooke v. Berry, 1 Wilson, 98; Knox v. Work, 2 Binn. 582; Ford v. Filley, 2 Salk. 653; Alexander v. Byron, 2 Johns. Cas. 318; Jackson v. Roe, 9 Johns. 77.

S. H. Gardner, for respondent.

SCOTT, Judge, delivered the opinion of the court.

One of the errors assigned in this cause is, that the court below improperly granted to the plaintiff a new trial. Ever since the case of Helm v. Bassett, 9 Mo. 51, it has been the established law of this court that a writ of error will not lie for granting a new trial. The reasons of the determination in that case are satisfactory, and we have seen nothing since which would warrant us in disturbing it. It is strictly in accordance with the rules and principles of law; while we consider that a contrary opinion would involve the administration of justice in intricacy and confusion.

Another error complained of is that the verdict was not warranted by the evidence. It can scarcely be necessary to repeat that this court, by a long course of precedents, has refused to interfere with the verdicts of juries on the ground they are against the weight of evidence, after the judge who heard the evidence has sanctioned the verdict by a refusal to grant a new trial. Jurors try the facts and the judges determine the law. Judge Ryland concurring, the judgment is affirmed; Judge Leonard absent.

Farrell's Adm'r v. Brennan's Adm'rx.

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**FARRELL'S ADMINISTRATOR, Plaintiff in Error, v. BRENNAN'S
ADMINISTRATRIX, Defendant in Error.***

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1. A failure to make all the representatives of a deceased plaintiff and a deceased defendant parties to the suit on or before the third term after the suggestion of the deaths, will cause the suit to abate only as to those representatives not brought in and made parties ; it is error to order the suit to abate entirely.
 2. Where, upon the decease of a party plaintiff, his administrator is made plaintiff as his representative, without the appearance of the defendant or notice to him, the irregularity will be cured by the appearance of both parties at a subsequent term, and the granting of a continuance on the motion of defendant.

Error to St. Louis Circuit Court.

This was a suit instituted in the St. Louis Circuit Court at the April term, 1850, by William Farrell, to set aside the will of Michael Farrell, plaintiff's brother, on the ground of mental imbecility and undue influence. The said will was duly proved. The petition made James Brennan, sole devisee under said will, defendant. James Cox and Esther his wife, Joseph Larkin and Andrew Larkin—said Esther, Joseph and Andrew being, as was alleged, co-heirs with the plaintiff of

* This case was decided at the October term, 1856, of the Supreme Court. It was overlooked by the Reporter. A motion to quash the writ of error was filed in behalf of the defendant in error, on the ground that a writ of error would not lie ; that the decision of the Circuit Court could be reviewed upon an appeal only. R. M. Field, in support of the motion to quash, maintained that a writ of error only lies to a court proceeding according to the course of the common law ; (Bac. Abr. A. 8;) that in the present case the Circuit Court was exercising no jurisdiction according to the common law, but was acting as an appellate probate court, and was administering the same law as the English ecclesiastical courts modified by particular statutes ; (Malone v. Hobbs, 1 Rob. Va. 846; Coalter v. Bryan, 1 Gratt. 18;) that the statute has restricted the rights of the parties in this proceeding to a correction of errors below to an appeal ; (R. C. 1845, tit. Wills, § 82;) that in all probate cases an appeal only is given by the statutes from the lower to the higher court ; (R. C. 1845, tit. Courts, Judicial Power, § 18 et seq.; ib. tit. Administration, art. 8, § 1, et seq;) that the language of the first section of the statute relating to practice in Supreme Court was interpreted in Anderson v. Biddle, 9 Mo. 580. The motion was overruled.—[REP.]

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the testator—were made co-defendants pursuant to article 3, section 7, of the practice act of 1849. The petition alleged that the said Michael Farrell, by the will sought to be invalidated, devised all his property, real and personal, to James Brennan. Process issued against all the defendants, but service was had only on Brennan. Brennan answered, asserting the validity of the will. At the November term, 1850, the death of James Brennan was suggested, and Anne Brennan, his widow and administratrix, voluntarily appeared and was made a party defendant. At the November term, 1852, the death of William Farrell, plaintiff, was suggested, and A. J. P. Garesché, his administrator, appeared and was made plaintiff. There was no appearance on the other side. At April term, 1853, both parties appearing, the cause was continued on motion of defendant. At the November term, 1854, the court made the following order: "The original parties to this suit having departed this life, and their proper representatives not having been brought before the court, on motion it is ordered and adjudged by the court that this suit abates." The motion for judgment of abatement was made in behalf of defendant, Brennan's administratrix. No steps had been taken to bring in the non-resident defendants. Plaintiff moved to vacate the said order and to reinstate the cause. Affidavits were filed in support of this motion, showing why it was that the public administrator of St. Louis county, into whose hands the estate of Michael Farrell, defendant's alleged testator, passed upon the death of James Brennan, was not made a party. It also appeared therefrom that the whole estate of Michael consisted of personal property. The court overruled the motion.

T. Polk and A. J. P. Garesché for plaintiff in error.

I. The action did not abate by death of either plaintiff or defendant. (R. C. 1845, p. 1083, § 31, et seq., p. 824, § 4 & 5; Practice Act of 1849, art. 3, § 9.) The record shows that on the death of the defendant, James Brennan, the appearance of his administratrix was entered by consent of plaintiff, as well as of herself. This order substituting the

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administratrix of Brennan as party in his stead was upon the appearance of the plaintiff and therefore regular. (R. C. 1845, p. 824, § 16.) Although the record does not show that at the time the administrator of the plaintiff entered his appearance there had been service of *scire facias* upon the opposite party, or that said party appeared and consented thereto, yet it does show that afterwards said party appeared and moved the court for a continuance of the cause, and made no objection to the entering of the appearance of the administrator of plaintiff. This obviates the necessity of a *scire facias*, or of the appearance of defendant at the time of substitution. The appearance of the administratrix of defendant and the administrator of plaintiff having been entered, it was error to order the suit to be abated. As to the personality of the estate of Michael Farrell, the administrators of both plaintiff and defendant were their proper legal representatives. Unless therefore that estate consisted of realty these administrators were proper parties. The record does not show that the estate was exclusively real estate; on the contrary, the bill of exceptions shows that it consisted exclusively of chattel interests. The administrators were therefore proper parties, and it was error to order the suit to be abated, even though other persons ought to have been brought in as parties.

R. M. Field, for defendant in error.

I. The principal question in the present case is as to the proper parties in a proceeding under the statute to set aside the probate of a will. The general rule at law and in equity is that all persons who have a material and direct interest in the subject of litigation are necessary parties. (1 Chit. Pl. 10, 47, 73; Sto. Eq. Pl. 86 et seq.; Calvert on Parties, 1, 151.) The distinction between courts of law and equity in this respect will be found to arise principally from the character of the interest—courts of law paying no regard to any interest save such as is strictly legal, while courts of equity look as well to the beneficial as the legal interest. The new practice act of 1849, art. 3, secs. 1 & 7, has in the main adopted the rule of equity, with this modification, that the

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holder of the naked legal title is no longer any necessary party when no relief is sought in his behalf against him. In the case of the death of a party *pendente lite*, a suit at law always abated, but the rule was otherwise in equity. The defect in the practice at law has been remedied by various statutes, but these statutes have ceased now to be of any importance since the new practice act has applied to all cases the rule of practice in equity. (Art. 3, sec. 12.) The rule in equity has always been, that in case of the death of a party the suit must be revived in the name of the person succeeding to the interest of the deceased party as it appears on the face of the pleadings. If the party was suing or defending in an official or fiduciary capacity, his proper representative would be the successor to the office or trust. If the suit concerned the real estate of the deceased, it must be continued in the name of the heir ; if personal, in the name of the executor ; and if both real and personal estate, then in the names of both heir and executor. (Sto. Eq. Pl. § 354 et seq. ; Calvert, 151, 219.) The rule as just stated has always prevailed in Missouri, although the formal mode of revivor is much simplified by the act regulating practice in chancery. (R. C. 1845.) This article was applied to all cases by the new practice act of 1849. (Art. 3, secs. 12.) According to the provisions of the 19th and 20th sections of the article just mentioned, a suit not revived within three terms after the suggestion of the death stood absolutely abated.

The object of the suit before the court was to set aside a will purporting on its face to dispose of real and personal property. William Farrell was plaintiff, suing as well for himself as for his co-heirs, who were formal defendants. The only real defendant was James Brennan, who as executor of the will was entitled to the personal estate, and as devisee, entitled to the real estate. At the November term, 1851, the death of Brennan was suggested and his compound character became dissolved. His rights as executor passed to the administrator *de bonis non* of the testator ; his rights as devisee were transmitted to his heirs. Plainly, the proper defendants

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in renewing the suit were the administrator *de bonis non et cum test. annexo* of Michael Farrell, the testator, and the heirs of James Brennan, the devisee. But at the date of the judgment of abatement, more than five terms after the suggestion of Brennan's death, none of these parties were before the court. Anne Brennan, the administratrix of the original defendant, was certainly no necessary party to the suit; but as she had ultimately an interest in the controversy, she was very properly permitted *ex gratia* to defend *pro interesse suo*. It is manifest that at this moment there is no substantial defendant on the record. Upon the death of William Farrell, the plaintiff, his interest in the personal estate of Michael Farrell passed to his administrator, and the latter was doubtless a proper party to the suit when revived. But his interest in the real estate descended to his heirs, and they were necessary parties as the representatives of that interest. More than three terms after the suggestion of William Farrell's death had elapsed before the judgment of abatement, and the heirs were not made parties.

II. There is a plain irregularity in the appearance of the administrator of William Farrell. It took place without any citation of adverse parties, and, as it were, behind the backs of those interested in the controversy.

III. The allegation that the estate of Michael Farrell consisted of personal property only, supposing it be fully proved by the plaintiff's *ex parte* affidavits, would not avail the plaintiff; for it so happens that the administrator who succeeded Brennan in the administration of that property under the will was not brought into court. But the conclusive answer to the plaintiff's affidavits is, that the question of the proper parties in the actual state of the proceedings must be decided by the case made in the pleadings, and can never depend on any outside proofs.

The section of our law under which the present suit was instituted is borrowed from the Virginia statute of 1785. (12 Henn. Stat. 142, sec. 11.) The course of proceeding under this statute is explained by Judge Baldwin, in Malone

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v. Hobbs, 1 Rob. 346. See also Coalter v. Bryan, 1 Gratt. 18. In Kentucky the provisions of the Virginia act were adopted in 1797. (2 M. & B. Dig. 1543, sec. 11. And see the exposition of the law in Rogers v. Thomas, 1 B. Monroe, 390; Livingston v. Livingston, 8 B. Mon. 240; Tibbats v. Barry, 10 B. Mon. 478.) Missouri borrowed the Virginia act as early as 1807. (1 Terr. Laws, 133, sec. 28.) It has continued in force ever since. (See Swarey v. Blackman, 8 Ohio, 5; Johnston v. Glumock, 2 Ala. N. S. 218; Moore v. Guent, 8 Texas, 117.)

SCOTT, Judge, delivered the opinion of the court.

We see no warrant in the law for the action of the court below in abating this suit. The question is not, who are all the proper parties to the proceeding; but whether there were any of the proper parties in court when it was abated. The 12th section of the 3d article of the practice act of 1849 enacts that "suits may be revived in the cases and in the manner and with the effect now provided in article 5 of practice in chancery, so far as may be consistent with the provisions of this act." Now if, as contended for by the defendant in error, this section continues in force the 19th section of the 5th article of the act concerning chancery practice (R. C. 1845, p. 850), we see no authority in that section to sustain the action of the court below. The section referred to provides that "in all cases where the representatives of a deceased complainant or defendant shall not be made parties, according to the provisions of this act, on or before the third term after the suggestion of the death, the suit shall abate as to such deceased party and the interest of his representatives therein, and the cause shall proceed in favor of and against the survivors." Now there being both a plaintiff and defendant in being on the record, it is obvious that this section conferred on the court no authority to abate the entire proceeding. The most that could have been done was to have abated it as to those who had not been brought in as required by law. It is singular, if the fact is as it is represented to be, that

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there is no real estate, the party did not amend his petition so as to remove this strife about parties.

It was said that the appearance of the representative of the plaintiff was made without notice to the opposite party. This irregularity was cured by the subsequent steps taken in the cause. At a term afterwards, both parties appeared, and the cause was continued for the reason that no notice of the revival had been given. This surely healed the error of the omission. The other judges concurring, the judgment will be reversed, and the cause remanded.

FAGIN, Respondent, v. CONNOLY, Appellant.

1. Although, as a general rule, the interpretation of written instruments belongs to the court and not to the jury, the construction and true interpretation of commercial correspondence may, under proper circumstances, be properly left to the consideration of the jury.

Appeal from St. Louis Circuit Court.

Knox & Kellogg, for appellant.

Hitchcock, for respondent.

RYLAND, Judge, delivered the opinion of the court.

Fagin, a miller in the city of St. Louis, shipped to Connolly & Co., who were his factors at the time in New Orleans, during the fall of the year 1853, quantities of flour for sale. Among the lots of flour thus sent were 1149 barrels of superfine. The flour was to be sold by defendants for the plaintiff Fagin, and under his directions. These 1149 barrels were in the possession of the defendants as factors and commission merchants of the plaintiff before the 5th of December, 1853, and so remained in their possession until the latter part of January, 1854, when the same were sold by the defendants for seven dollars per barrel, the then market price.

From the evidence presented by the bill of exceptions, it

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appears that Fagin by a dispatch by telegraph, dated 5th December, 1853, instructed the defendants to hold his flour at seven dollars for superfine, and extra flour in proportion; that after receipt of this dispatch the defendants wrote to Fagin at different dates advising the plaintiff to leave them to sell his flour without any limit as to price, trusting to their discretion. On the 13th of December, 1853, the plaintiff wrote to defendants and removed all limits as to his flour, hoping that they would do ample justice to him in closing sales, and requesting them to close the plaintiff's business as soon as practicable. The court, who tried the case without a jury, found as a fact that this letter revoked all previous limits on the flour of plaintiff in the hands of defendants. This letter was received by defendants. The usual course by mail required about eight days. On the 21st of December, 1853, Fagin sent a dispatch by telegraph to defendants, which was received by them the same day or the next day, instructing them to hold his superfine flour and retail his extra flour. The defendants did hold his superfine flour until the 17th day of January, 1854, on which day, and on the following days up to the 20th of the same month, they sold the superfine flour of the plaintiff at seven dollars per barrel—the whole lot of 1149 barrels. This was done without any order from the plaintiff after the dispatch of the 21st of December. On the 31st of January, 1854, the plaintiff sent a dispatch by telegraph to defendants directing them to sell his flour after the receipt of the "Atlantic's" news. This dispatch was received by defendants on the 1st of February, 1854; and on the same day the "Atlantic's" news was published in New Orleans. The market price for superfine flour in New Orleans on that day and a few succeeding days was from \$7.75 to \$7.87½ per barrel. The flour would have realized in market, if it had been retained under the plaintiff's dispatch until the 1st of February, 1854, not less than seventy-five cents per barrel net more than the price at which it was previously sold.

Now the question here which was submitted to the court

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below for trial was, whether the defendants had sold the plaintiff's flour contrary to orders; and the construction of the dispatch and letters on this subject was necessary to a proper solution of this question. In this case the meaning or construction of the dispatches has been found by the court as a fact in the same manner as the jury would have found facts.

In Brown & Co. v. McGran, 14 Peters, 493, Mr. Justice Story, in delivering the opinion of the court, said: "It is certainly true as a general rule, that the interpretation of written instruments properly belongs to the court and not to the jury; but there certainly are cases in which, from the different senses of the words used, or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects and intentions and agreements of the parties are often to be arrived at only by allusions to circumstances which are but improperly developed. McGran, in the letter of the 20th April, says that 'he wishes the defendants to hold any cottons on hand until they hear from him again.' Now this language certainly ordinarily imports only a desire, and not an order, and yet there can be no reasonable doubt that, under particular circumstances, a wish expressed by a consignor to a factor may amount to a positive command. So in the reply of 24th May the defendants say: 'Your wishes in respect to the cotton we now hold on your account are noted accordingly.' Here again the point is open whether the language imports that the defendants construed the wishes of the plaintiff to be simply a strong expression of desire or opinion, or a positive order; and also whether the words 'noted accordingly' import that the defendants took notice thereof, or took notice of, and assented to obey, the wishes or order of the plaintiff." In Lucas v. Groning, 7 Taunt. 164, the meaning of the expression, "*please to give them credit in exchange when the bills were duly honored,*" became important to be

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ascertained. Gibbs, Ch. Justice, said : "This was a question singularly fit for a jury, and one on which they were likely to arrive at a sounder conclusion than the court, because their knowledge of it arises from their daily experience. But the question whether the phrase, '*when duly honored*,' means when they were accepted, or when they were paid, was a question not so much for the consideration of a court as of a jury." Park, J., said : "The solicitor general argues that the phrase 'duly honored' means *accepted*. Whether it does so or not, has been left to the jury, and they have found that it meant *payment*, which is the opinion I should myself have formed." In Rees v. Warwick, 2 Barn. & Ald. 113, the meaning of the words, "Your bill of £100, in favor of W. Johnson & Co., *shall have attention*," was left to a jury to be ascertained ; and they by no means thought that the words, "*shall have attention*," were clearly and unequivocally an acceptance of the bill. What is the true interpretation of mercantile phrases, in such instructions or orders, is not always a question of law, but may in many cases be properly left to a jury to decide, where the phrases admit of different meanings. (Story on Agency, § 75.)

Under the principles contained in the above cases, and according to the authority above cited, the meaning of the dispatches and instructions given by plaintiff to defendants was not so much for the consideration of the court as a matter of law, as for the consideration of a jury. Here the court, sitting as a jury, found the meaning of these dispatches, and, according to such meaning, the defendants sold the flour contrary to orders, and are liable to plaintiff for the injury arising from such breach of orders. If the meaning of the dispatches was in so much doubt, or if this court might have found differently even from the court below, still that will not warrant our interference with the finding, where it might have been, from the evidence, either way. The construction of the dispatches not being a mere question of law, but more a question of fact, we can not as a matter of law say the court below erred.

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From a careful examination of the evidence preserved in the record, I am satisfied with the finding of the court below, and entertain not the slightest doubt that the sale of the 1149 barrels of superfine flour was made against express directions. The whole correspondence between these parties warrants that conclusion. Here the superfine flour was under a limit—\$7. The defendants wrote to plaintiff advising him to remove all limit and leave the flour in their hands free to be sold at their discretion. He answers this letter, removing all limits. This answer reaches the defendants, but not before the telegraphic dispatch ordering them to "hold superfine, and retail extra." The telegraphic dispatch is dated 21st—the letter removing limits is dated 18th December. Now no matter what the defendants might have supposed to be the meaning of the dispatch, the moment they got the letter they would then see that Fagin sent the dispatch to do away with what he might suppose would be the effect of his letter on the superfine flour. He had removed all limits. He then withdrew from market his superfine flour by his dispatch—waiting for a better market ahead. The defendants had no right to suppose the dispatch was the answer of Fagin to their letter asking to withdraw all limit on the price of the flour, after they received his letter expressly purporting to answer it. They should have examined the dates of the letter and the dispatch, and then I think that there could have been no mistake about the intentions of Fagin. After Fagin's dispatch ordering defendants to "hold superfine and retail extra," if the market had risen to ten dollars per barrel, they had no right to sell the superfine without further orders from Fagin. The withholding the superfine was not until at a certain price in market, but must mean until further orders. The judgment will be affirmed; the other judges concurring.

Clark v. Humphreys.

E. W. CLARK & BRO., Appellants, v. HUMPHREYS, Respondent.

1. A master of a vessel, as such, has power to bind the owners for necessities and repairs only : the burden of proving the necessity lies upon the creditor.
2. A custom or usage of trade, to be valid and binding, must be reasonable.
3. A custom or usage among masters and clerks of steamboats for the master to draw bills of exchange upon the clerk, and negotiate the same, is an unreasonable custom and can not be invoked to fix a liability upon the owners to the parties to whom such bills of exchange may be transferred.

Appeal from St. Louis Court of Common Pleas.

This was a suit brought by E. W. Clark & Bro., bankers, payees of the bills of exchange set forth below, against Solon Humphreys and Henry Corwith as part owners of the steamboat "Michigan."

"Exchange for \$1500. St. Louis, Mo., 10th July, 1854. Three days after sight of this first of exchange (second unpaid), pay to the order of E. W. Clark & Bro., at the office of Samuel Smith & Co., fifteen hundred dollars, for value received, for steamer Michigan and owners. [Signed] per Robert A. Reilly, master. To W. M. Tompkins, jr., clerk of steamboat Michigan, New Orleans, La."

"Exchange for \$375. St. Louis, Mo., 13th July, 1854. Two days after sight of this first of exchange (second unpaid), pay to the order of E. W. Clark & Bro., three hundred and seventy-five dollars, for value received, account of steamboat Michigan and owners. [Signed] per Robert A. Reilly, master. To Wm. M. Tompkins, jr., clerk steamboat Michigan, New Orleans, La."

The petition set forth the drawing of the above bills on behalf of said steamboat Michigan by the master thereof, R. A. Reilly, and their acceptance, July 20, 1854, by the drawee, W. M. Tompkins, clerk of said boat ; also their presentment for payment at maturity, and their protest for non-payment ; of all of which defendants are alleged to have had due notice.

The suit was dismissed as to Corwith. At the trial the fol-

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lowing proof was introduced by plaintiffs: That at the dates of said bills of exchange the defendant Solon Humphreys and Henry Corwith and Robert A. Reilly were owners of the steamboat Michigan, and said Reilly was master, and William M. Tompkins, clerk of said steamboat; that the bills of exchange sued on were drawn by said Reilly and accepted by said Tompkins as stated in the petition; that they were protested for non-payment; that neither the drawer nor the acceptor of said bills, nor the owners of said steamboat, provided any funds for the payment thereof; that said Tompkins accepted said bills solely as clerk of said boat, and had no funds in his possession for their payment from the time the same were drawn till their maturity; that "for the last twenty years it has been the general custom of the masters of steamboats to draw bills of exchange like those sued on; that it was often specified in such bills on what account they were drawn; that this is often done for the purpose of raising money to defray the expenses of running steamboats and for paying charges; that it has been a general custom for such bills to be drawn and negotiated, and such was the usual practice of officers of steamboats."

Upon the above evidence the plaintiff asked the court to give the following instructions: "1. The notice to one of several owners of a steamboat of the dishonor of a bill of exchange drawn by the officers of a steamboat is a notice to all. If the jury find from the evidence that Robert A. Reilly was a part owner of the steamer Michigan at the date of the bills of exchange sued on, and that the said Reilly had due notice of the presentation and dishonor of said bills of exchange, such notice is sufficient to bind the other owners of said boat; provided the jury shall further find that the drawing of bills of exchange is within the usual and customary business of the masters and clerks of steamboats. 2. If the jury find from the evidence that the bills of exchange were drawn and accepted as stated in plaintiffs' petition, and that said Reilly and said Tompkins knew, when said bills were drawn and accepted, and when they were payable, that said bills would

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not be paid when due, and that in fact no money was provided by the officers or owners of said boat to pay said bills at their maturity, then the owners of said boat can not relieve themselves, and are not discharged from liability, in consequence of not having received notice of the non-payment of said bills of exchange. 3. If the drawing, endorsing and accepting of bills of exchange be within the ordinary and customary business of masters and clerks of steamboats, then such acts may be binding upon the owners of steamboats whose masters or clerks draw, endorse or accept such bills, and the owners of steamboats may be held liable on said bills. 4. If the jury find from the evidence that Robert A. Reilly was, at the date of the bills of exchange sued on, master of the steamboat "Michigan," and drew the bills sued on on William M. Tompkins, clerk of said boat; that said Tompkins was then clerk of said boat, and accepted the same; that said bills were duly presented for payment and payment thereof was duly demanded, according to the tenor of said bills, and was refused; that said bills were duly protested for non-payment, and that the defendant had due notice of said demand, refusal and protest; and if the jury shall further find that it was within the usual and ordinary scope of the business of the officers of boats to draw and accept bills of exchange, they will find for the plaintiffs in this suit. 5. If it be within the ordinary and customary business of the officers of steam-boats to draw and accept bills of exchange for or on account of their boats, then a notice of the dishonor of such bills so drawn, duly given to such officers, is as effective to bind the owners of boats as if such owners had received personal notice."

The court refused to give the foregoing instructions, and instructed the jury that upon the facts proved the plaintiffs were not entitled to recover; whereupon the plaintiffs took a non-suit, with leave, &c.

Knox & Kellogg, for appellants.

I. There is always an implied authority vested in an agent to do all such acts as it is usual and customary for agents in

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similar circumstances to perform. As there is no law prohibiting masters and clerks of steamboats from drawing and accepting bills of exchange, and it has ever been recognized as an authority incident to their business, and usually exercised, there is nothing either in the law or reason that will prevent the owners of steamboats from being liable on such bills of exchange. Owners of steamboats are bound by the negotiable paper executed by the officers of steamboats. (6 Mo. 355; 9 Mo. 654; 10 Mo. 531.)

II. There was no necessity of a notice of non-payment in this case. (Sto. on Bills, § 367.) Besides, notice to Reilly was notice to all. A notice to the master and clerk was a notice to the owners.

H. Hitchcock, for respondent. The master and clerk of a steamboat have no authority, as such, to draw, accept or endorse bills of exchange in the name or behalf of the owners, so as to bind them without special authority. (See 10 Metcalf, 375; Abbott on Shipping, 178.) Nor has he such power as part owner. (Abbott on Ship. p. 107.) No usage for a master to draw bills on his owners is legal, valid or binding; nor should proof of such usage have even been received. (10 Metcalf, 375; 5 Shep. 147.) The authority of a master as such to bind the owners even for necessaries, does not exist at home. (Arthur v. Burton, 6 Mees. & Wels. 188; Abbott on Ship. 175.) The power of a master to bind the owners either for necessaries or repairs, like that to hypothecate the ship, applies to foreign ports, and this does not either at such ports or at home include the power to draw, accept or endorse bills of exchange—at least unless it be affirmatively shown what the object and necessity of the transaction were. (See Abbott on Shipping, p. 152, 167, 168, 172, & notes.) There being no evidence as to the purpose for which the bills in question were drawn, nor of the application of the money raised upon them, nor of any special authority to draw, accept or endorse them, the instructions asked were properly refused.

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SCOTT, Judge, delivered the opinion of the court.

By the maritime law, the authority and duties of masters of vessels are defined. The master only has authority to bind the ship-owner for necessaries and repairs, and the burthen of proof is on the creditor to show that the services rendered, or the money and goods advanced, were for those purposes, or to prove the actual existence of the necessity of those things which give rise to his demand. (Abbott on Ship. 172.) If a bill is drawn by a master and passed by negotiation to an innocent endorsee, the burthen of proof will be shifted from the creditor to the owner to his disadvantage. Collier says that a partner will not be liable even to a *bona fide* endorsee if he can show that the bill was given on another account than for necessities. (Sec. 1227.) Thus showing that, by drawing a bill which passes to an innocent endorsee, the burden of proof will be changed from one party to the other.

It does not appear that the bills in controversy were drawn for necessaries, unless the words on the face of them, "for value received, account of steamboat Michigan and owners," import as much. But this will not relieve the creditor, in our opinion, from the necessity of proving that the debt was contracted for necessaries, or that a necessity existed which rendered the credit necessary.

We do not see how the custom proved affects the owners of vessels. The evidence is silent as to whether they acknowledged themselves bound by such bills. If the captain or master draws bills or orders on the clerk and they are honored, that may be a private arrangement between themselves for their own convenience in managing the concerns of the boat, and can not affect the owners, nor show that they regarded themselves liable for such acts of their agents. But a custom that a master of a boat, by a bill of exchange on the clerk of the same boat, may bind the owners for any sum he may see fit to draw, would be so inconvenient and unreasonable that no wise system of law could sanction it.

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Prudent men would scarcely consent to become owners of vessels under such a state of law. In the case of Bowen et al. v. Stoddard, 10 Met. 380, the court held that there was no such relation between the joint owners of a vessel as would warrant the conclusion that a bill drawn by one of them on the others in a foreign port for necessaries would be an acceptance of such bill. It was moreover holden that a usage among the merchants of New Bedford and Fairhaven, engaged in the whaling trade, to accept the bills of their masters drawn for supplies furnished abroad, is not such a one as can charge the owners as acceptors; for a usage to be legal must be reasonable as well as convenient, and that a usage can not be reasonable which puts at hazard the property of the owners at the pleasure of the master by making them responsible as acceptors on bills drawn by him. There is no hardship in this, for if it is necessary that a master should have such authority it is a very easy matter to confer it on him by express words. The owner then, knowing in whom he confided, would not be in danger of being ruined by the acts of his agents. A constituent may be willing to entrust to an agent an authority for some purposes, whilst an authority for other purposes would be carefully withheld from him.

From the petition, it would seem that this cause in the court below turned on an implied authority in the master to draw the bills and the custom which was attempted to be set up by the evidence. The fact came out on the trial that the master was also part owner of the boat. Giving the plaintiffs the full benefit of this disclosure and amending the pleadings to accommodate them to this state of facts, and we are satisfied that he is not entitled to recover for the reasons that have been stated. The other judges concurring, the judgment will be affirmed.

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LINDERMAN et al., Defendants in Error, v. EDSON et al., Plaintiffs in Error.

25	106
41a	569
25	106
53a	50
25	106
146	151

1. A justice of the peace certified a transcript as follows: "I certify the above and foregoing to be a full and complete transcript of the above entitled cause now of record on docket of David W. Doak, deceased, late justice of the peace within and for St. Ferdinand township, in St. Louis county. [Signed] S. H., Justice of the Peace." *Held*, that the justice so certifying would be presumed to be in the lawful possession of the docket of the deceased justice.
2. A. sued B. and C. in a justice's court, and obtained judgment; execution issued and was returned "nulla bona" as to one of the defendants, but whether as to B. or C. did not appear; nor did it appear against which of said defendants said execution issued, nor whether it issued against both defendants. A transcript of said judgment was filed in the Circuit Court, and an execution was issued thereon, and real estate belonging to B. was sold at a sheriff's sale thereunder. *Held*, that the purchaser at sheriff's sale acquired no title.

Error to St. Louis Land Court.

This was a suit in the nature of an action of ejectment brought by the plaintiffs as heirs of Henry Linderman, against the heirs of Homer Edson, to recover possession of a tract of fifty arpens of land in the county of St. Louis. The defendants set up title in themselves. Taylor Johnson is the common source of title. In support of their title the plaintiffs introduced a transcript from the clerk's office of the Circuit Court of St. Louis county. From this transcript it appeared that on the 21st of April, 1845, there was filed in that office the following transcript:

"William Jacob Miers & Co. v. Taylor Johnson and H. W. Carter. Suit on a joint promissory note for \$32. Said note bears date on the 4th day of November, A. D. 1842; and made payable nine months after date. Summons issued the 5th February; returned executed on the 17th. On the return day the defendant appears; stays proceedings until the first day of June thereafter. Now on the first day of June, being the day of trial, defendants comes not, but makes default. Judgment for plaintiffs for amount of said note, interest and costs of suit by default. Debt, \$32; interest,

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60 cents ; justice's fees, 56 cents ; constable's fees, 50 cents. *Fi. fa.* issued 3d day of June, 1844 ; alias *fi. fa.* issued on 31st of October, 1844 ; returned 'no goods' of the within defendant found whereof to levy. [Signed] David W. Doak, J. P."

"I certify the above and foregoing to be a full and complete transcript of the above entitled cause now of record on docket of David W. Doake, deceased, late justice of the peace within and for St. Ferdinand township, in St. Louis county. [Signed] Samuel Henley, Justice of the Peace."

It appeared also that on the 21st of April, 1845, execution issued on said transcript from the clerk's office of said Circuit Court ; that the tract of land in controversy was levied on as the property of the said Taylor Johnson ; that the same was sold by the sheriff to John Smith and Henry Wortman, June 16, 1845 ; that the sheriff executed a deed to the purchasers, who conveyed the same to Henry Linderman, plaintiff's ancestor. Defendants claimed by virtue of a deed from Taylor Johnson to Homer Edson, their ancestor, dated May 20th, 1845.

The cause was submitted to the court upon the above facts (which were agreed upon by the parties) under an agreement that if the court should be of opinion that the evidence adduced is admissible and competent, and that plaintiffs ought to recover, they (plaintiffs) shall have judgment for possession of the premises. The court gave judgment for plaintiffs.

S. Reber, for plaintiffs in error.

I. Where a party claims under a sheriff's deed, he must show a judgment, and if it is a justice's judgment, he must further show that an execution had been issued by the justice and a constable's return of *null bona*. (*Coonce v. Munday*, 3 Mo. 374 ; *Murray v. Laften*, 15 Mo. 621.) In this case, the only scintilla of evidence that an execution was issued by the justice is found in the transcript of the docket filed in the clerk's office, where it is stated, "*fi. fa.* issued June 3, 1844 ; alias *fi. fa.* issued October 31st, 1844 ; re-

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turned, ‘no goods of the within *defendant* found whereof to levy.’” It does not appear against which of the defendants it was issued, nor when returnable, nor when returned, nor to whom directed or delivered ; whether to a constable or some other officer, or to no officer at all ; nor by whom the return was made. Can the court guess that every thing was regularly done from this slight memorandum of the justice ? Besides, an execution issued by a justice and not returnable according to law is void. (Stevens v. Chouteau, 11 Mo. 382.) The memorandum on the justice’s docket of the *return* of the execution is not evidence, because he was not required by law to make it. It being established by this court that an execution must be issued by the justice and returned by the constable *nulla bona*, and that an execution not returnable according to law is void, it follows that a party claiming title under an execution from the Circuit Court on a justice’s judgment, must show a valid execution issued by the justice, and a proper return thereof. If this is not shown, the party’s title is defective, for the sale is void.

II. Was the judgment of the justice rendered against both of the defendants, or only against one of them ? and if so, which one ? In the caption of the entry in the justice’s docket, Johnson *and* Carter are mentioned as defendants ; but in all the subsequent entries “*defendant*” is mentioned in the singular, except in one unimportant instance ; and so in the return of the execution, no goods of the “within defendant” are found, &c. Thus showing, both in the judgment and in the return, that only one of the nominal defendants was a party to the suit ; and if this be so, why not sell the land of Carter as well as that of Johnson ? The docket entry shows the entry in the singular was not a grammatical error, but is according to the truth of the fact that only one of the parties was sued and served with process.

III. But if the justice’s transcript contained a perfect judgment and a regular execution and return, it was inadmissible evidence, because not properly authenticated. What authority had Justice Henley to certify a transcript of the

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"docket of David W. Doak, late justice of the peace," &c.? The 14th section of the act concerning evidence, (Sess. Acts, 1838-9, p. 43, which has been incorporated in the revised codes of 1845 & 1855, tit. "Evidence,") provides that the proceedings of a justice out of office may be certified by a justice who has possession of his docket and papers. This is the whole law on the subject. Now what evidence is there that Henley was Doak's successor or had possession of his docket? The possession spoken of in the statute is a legal possession, not a mere manual possession, and that legal possession must be in some way proved before a transcript certified by the possessor can be received in evidence. The statute provides how the docket and papers of a justice retiring from office shall be transferred to another justice, so that that other may come into lawful possession thereof. The fact of the transfer then is a fact to be proved when it is attempted to use copies certified by the latter. How the fact is to be proved is not for me to say; perhaps the justice's own certificate of the fact would be sufficient. But certainly the mere fact of the justice's making a certified copy of a record is no evidence that that record is in his lawful custody.

Gibson, for defendants in error, cited *Mooney v. Williams*, 15 Mo. 443; *Palmer v. Hunton*, 8 Mo. 514.

SCOTT, Judge, delivered the opinion of the court.

It is made an objection to the action of the court below that it admitted in evidence the certificate of the justice who returned the transcript to the office of the clerk of the Circuit Court, which does not show how he became possessed of the papers and records of the justice whose proceedings he transcribed and certified. The justice who certified the transcript not being the same officer before whom the cause was tried and by whom the judgment was entered, it is maintained that it should appear by evidence, or at least that his certificate should show, how he came into the possession of the docket and papers of the other justice. The law points

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out two modes in which one justice may become possessed of the papers of another. The second section of the act to recover records provides that "when any civil officer shall die, having any record, books or papers appertaining to any public office or any court, his executor or administrator shall deliver such records, books and papers to his successor." The 32d and 33d sections of the act to provide for the election of justices of the peace and to prescribe their powers and duties, direct that "whenever a justice of the peace shall resign, remove out of the township, or be otherwise disqualified, he shall immediately thereafter deliver to the clerk of the county court all dockets, records, books, papers and documents appertaining to his office, or relating to any suit, matter or controversy committed to him in his official capacity; and that the clerk shall immediately thereafter cause the same to be delivered to some justice of the peace of the township in which the vacancy happened." The law nowhere provides the manner by which it shall appear in such cases that the certifying justice is the successor of him of whose papers he gives copies. If proof of such fact was required, on what ground would the certificate of the justice be evidence of it? The objection would require evidence *in pais* that the papers had been delivered, for the statute does not make the certificate of the justice evidence of such fact. Does not the fact that the justice certifies the papers officially raise a presumption that he is lawfully possessed of them? Should not that presumption stand until the contrary is made to appear? In the higher offices, when there is a devolution of their duties from one incumbent to another, it is not necessary to prove that the acting incumbent is a regular successor. That is presumed until the contrary is shown. If, when one as a justice gives a certificate, we presume him, until it otherwise appears, to be duly elected and qualified; why may we not presume, when he officially certifies a paper to be a copy, that the original is lawfully in his possession, when we know by law that it may be with him? Why not require proof of his qualification and election in the one case as well as of his

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possession of the original in the other? We are supposing a case in which the principle in relation to officers *de facto* would not be applicable. We do not consider that the 24th section of the act concerning evidence affects this question. A certified copy of any public paper in the custody of an officer is evidence on general principles. The section must be regarded as cumulative.

We do not see how the objection of a want of an execution on the justice's judgment can be surmounted. There is nothing in the circumstances of this case which should create an inclination to relax the rules of evidence in order to sustain the title acquired by the sheriff's sale. That title was acquired after the deed through which the defendants claim. That deed was for a valuable consideration, and, from every thing that appears, with but constructive notice. The plaintiffs and those through whom they claim, taking a title which was to displace others acquired for value, should be prepared to show that the law has been complied with. If we take it that in the justice's proceedings there was a judgment against both defendants, yet it can not be made to appear against which of the defendants the execution issued, even admitting that the memorandum of the justice on his docket was evidence that an execution had been issued, about which we give no opinion. The execution was not in evidence, and the plaintiffs relied on a memorandum on the justice's docket, in these words: " *Fi. fa.* issued the 3d day of June, 1844; alias *fi. fa.* issued on the 31st October, 1844. Returned, 'no goods of the within defendant found whereof to levy.'" To sustain this case, it was necessary for the plaintiffs to show that there was a judgment against two. Now with such an entry placed opposite a judgment against two persons, how is it possible to say that it was against both? and even if it was against both, which of the two had no goods whereof to levy? Cases have been decided on the difference between *defendant* and *defendants*—the singular and the plural. We do not know that the word *defendant* by itself, like the word *heir*, has ever been taken as a *nomen collectivum*. We will not

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say that it may not be placed in such connection as to import a plural signification. This may seem a nice distinction, but, as before observed, we see nothing in this case on its merits which should create an inclination to administer the law otherwise than in all other cases. The plaintiffs' title was acquired after another. In order to defeat that title they must be prepared to show that on their side the law has been complied with. They knew that they could only obtain a title by showing a compliance with the law. Judge Ryland concurring, judgment reversed, and cause remanded; Judge Leonard absent.



25	111
104	643
25	111
117	661
25	111
131	339
25	111
141	67
142	525
25	111
154	290
25	111
156	213
156	228
25	111
160	396
25	111
162	172

THE STATE, Respondent, v. NUESLEIN, Appellant.

1. A jury, in the case of an indictment for murder, were instructed as follows : "If you have a reasonable doubt of defendant's guilt, you should acquit; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching defendant's guilt, and not a mere possibility of his innocence :" *held*, that the instruction was good.
2. To constitute murder in the first degree, it is not necessary that the fatal stroke be given with the specific intent to kill ; it is sufficient if it be given wilfully and maliciously, and with the intent to inflict great bodily harm.
3. Whether a weapon used, a stick or club, is of a character likely to produce death or great bodily harm is a question of fact to be passed upon by the jury.

Appeal from St. Louis Criminal Court.

C. C. Carroll, for appellant.

C. G. Mauro, (circuit attorney,) for respondent.

RYLAND, Judge, delivered the opinion of the court.

Jacob Nueslein was indicted at the September term of the St. Louis Criminal Court, in the year A. D. 1856, for the murder of Ann Mary Nueslein. He was subsequently arraigned and plead not guilty. There was a mis-trial of the case in November—the jury failing to agree in a verdict. He was tried in January, 1857, in the St. Louis Criminal Court,

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and was convicted of murder in the first degree. He moved for a new trial, which being overruled, he excepted, and brings the case here by appeal. In this court his counsel relies principally for a reversal of the judgment upon improper instructions given by the court below to the jury, and upon the refusal of the court to give a proper instruction asked by the defendant. The bill of exceptions discloses the following circumstantial evidence in the case:—Mary McDonald, a witness for the State, testified as follows: I live beyond the reservoir. I don't know the street. My house is below the reservoir; I live about forty yards from defendant's house. His house is this side of mine; his is nearest the city. Defendant lived there four or five months. I knew Ann Mary Neuslein; she was the wife of the defendant; she is dead; she died on Friday, July last. I saw her on that day before she died; I saw her that day between seven and eight o'clock, pulling lettuce seed. She was near the fence; just saw her there. I saw defendant at that time on the other side of the field plowing with horses; I never saw her after that until I saw her dead; I saw her dead between ten and eleven o'clock of that day. I was eating my dinner and the defendant came to my house. He said, "come neighbor, come;" he was outside on the prairie, near my door; he then turned and ran home, entering one door and coming out of another of his house, and passed down to the cellar. I was just behind him. He took hold of her and raised her up and bid her wake up; I saw she was dead and ran out again; I did not remain in the cellar but a minute or so, and came right out and met my husband at the cellar door. He went down; I went back through the house; I did not then see wounds on her; I knew by her looks that she was dead; I felt her leg, it was cold.. My husband came out in a couple of minutes; he went over for neighbors; he was not long away; I remained watching the defendant; he (defendant) brought her (his wife) in or through the back door, and laid her down on the kitchen floor; that was when he saw my husband coming back with the neighbors. He (defendant)

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took a pitcher off of the shelf and ran in the hole or cellar again ; he only laid her on the floor ; I did not afterwards go to the house until he was taken to the jail. My husband and a one handed German arrested him ; I did not hear him (defendant) say any thing at that time. Ann Mary was, as I said, on the floor of the kitchen ; I saw a large cut behind her right ear ; her eyes were black, and her nose was scratched ; her knees were black and blue ; all seemed black and blue around her shins ; they were scratched like you had hurt them. I saw blood on the wall over the lounge in the dining room. The blood was as high about as the head would reach in sitting on the lounge ; not a great deal of blood was on the floor. Her brother Cooper, who was in Frenchtown, came and took her away in a carriage. I saw said Ann Mary sometimes in the field working with defendant ; at one time I saw defendant strike her ; he made a few boxes at her with his hand ; he struck at her as fast as he could until she ran into the house. This was a good while before Ann Mary died. I saw blood on his shirt as they were taking him to jail ; I saw some one having hold of a piece of stick on which there was some blood. Patrick Shehan has gone away, also his wife. When I first saw Ann Mary on the day she died, she was in a lump doubled up ; the clothes looked tattered ; her hair was nasty and dirty looking. I did not see blood in the cellar ; did'n't go to see it. On cross-examination, the witness said : I reckon defendant knew what ailed his wife when he came to our house. There might have been persons at defendant's house between the time I saw her in the garden and the time when defendant came over to our house saying, "come, neighbor, come ;" I mean other persons than defendant. He (defendant) seemed to be much distressed when he came over, judging from his manner ; he seemed like a crazy man. When I first went into the cellar, he shook her up, and told her to wake. Ann Mary was barefooted at that time. I saw scratches on her nose ; her eyes were black and her face was black ; I don't know but these bruises might have been caus-

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by her falling down; I was but little acquainted with deceased, Ann Mary; I think she was a good little woman; I never saw her drunk.

The coroner, William J. Kennedy, was next called as a witness. He stated as follows: I am the coroner of St. Louis county; I saw defendant first in the calaboose; I went to defendant's house and saw him at the calaboose afterwards; I went there on the 26th day of July last. It was the day after his wife's death. The house is situated near the new city reservoir, to the west of it—about three or four blocks west of it. The house faces to the road running east and west; fronts to the north, being on the south side of the street. Mrs. McDonald lives two or three hundred yards from Neuslein's, being further west. The road runs twenty feet from the house. McDonald's house is rather north-west from defendant's. Defendant's house is a one story frame, with two rooms in it; two doors facing to the north, and one to the south; the rooms alongside of each other; a front door to each of these rooms; a fire-place between the two rooms; the door on the south from the east room; the cellar is underneath the east room; it is about eight feet square, dug out of the clay, and about five feet deep; there was a small hole to go down into it on the south side of the house; the hole is about three feet broad by two and a half deep; it slants down into the cellar, and you have to bend down to get into it; there are no steps going down to the cellar. The said house is within the city and county of St. Louis. I went about eight o'clock in the morning to hold an inquest on Ann Mary Neuslein; I saw her laying on the floor on her back, in a crooked position, in the east room, on the south side of the room, her head towards the west. The house was in a disorderly state. The bed clothing and floor in the west room clean. The bed was in the west room, and lounge in the east room, in the south-east corner. There was blood on the floor under her head; a considerable pool of blood. Her hair was all matted up. There was a spot of blood under the dining table; this was in the north-east corner, about four

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feet from where she was laying. There was some blood on the wall, immediately over the settee or lounge, about as high up as a person would sit. There was not a great deal of blood, but enough to see it. I examined the body of the deceased ; found a wound on the right side of the head, just above her ear, about one inch and a half in length, cut into the skull bone. The skull bone was laid open, and to be seen. There was a dent, and a sensible one, in the skull. There were bruises on her face. Her eyes were black. In the forehead was a bruise that appeared to have been done with some heavy instrument or fist. Her face was rather pale. There were several other scratches on her face, and one on her nose. There were two bruises on her left breast, one of which was three or four inches in diameter, nearly round ; the other was not so large. These wounds were inflicted, as it appeared to me, with some blunt instrument. There were no other wounds on her breast. Both of her shin bones and knees were skinned. The said wounds could be done by falling down or a kick from the boot, both of them. Her legs were skinned from the toes up to the knees. The whole body appeared to be black and blue all over. I did not turn her over. There was blood on the bosom of her clothes and sleeves. She had been bleeding. The blood came out of her right ear, and out of her nose. The right ear was full of blood ; the left ear did not bleed any. The nose was swollen. I went down in the cellar ; there I saw blood, but not a great deal. It was on the hoops of the barrels, about four inches above the ground ; two or three barrels in the cellar, in the back part, to the north-east corner. There were jars and crocks, about a dozen, in the cellar. The barrels and jars took up half the cellar. I saw a piece of pine wood with blood on it, about three feet in length, and about two and a half inches broad, and one inch thick. The stick was broken in three pieces ; one piece was about eighteen inches in length, which had the blood on it. It was broken, and there was blood on the new part. The blood was on the new part, as if seized hold of with bloody fingers. There was no

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more blood on that piece. I matched those pieces together and they made a stick about three feet in length. There was blood on the smaller piece. I matched the piece to the wound on the head of the deceased, behind the right ear. The blood on the edge of the stick just fit the wound. There was hair on the stick, and that was the same as the hair on the woman's head. A good lick with the stick would knock a person down. She was rather a small woman ; looked to be delicate. She might have died from congestion of the brain from the blow inflicted on the head. I have been coroner from last August two years ago. I have held many an inquest in that time. I have seen blows on the head which caused death similar to the wounds on the head of deceased. The wounds on the head and those on the left breast of deceased were sufficient to produce death. I was there about two hours and was holding the inquest. I next saw defendant about twelve o'clock that day ; I conversed with him ; I asked him if his name was Neuslein ; he said "yes." I asked him if he was going to bury his wife, or let the county bury her. I told him he had killed her, and asked him what he whipped her with. He said with a stick of wood. I asked him what he whipped her for. He said she would not cook his breakfast. When I told him he had killed her, he appeared affected and cried. [Cross-examined.] He (Nueslein) did not say that she, the deceased, got drunk. I do not recollect to have stated any thing to the contrary of what I stated now ; if I did, it was a mistake. I did not find any blood on the mantel-piece ; I do not think the wounds on the deceased could have been produced by a fall. There was no doctor present at the inquest. Her dress was disarranged ; I believe I testified her clothes were disarranged. There was most blood on the back of her head. I can not say whether I did state that the most of the blood was in her bosom or not. There was no indication of a struggle. The stick was handed to me, and was in three parts. They were all handed to me. The edges were sharp. The stick was undressed plank. The wound was a contusion rather than a cut. The

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blood was on the edge of the piece handed to me, and not on the side. The blood was on but one piece of the stick, and in one place. I applied the bloody stick to the wound ; it fitted the wound. I saw no fracture. There was no fracture on the eye. The bruises were black and blue. I can not tell how long after the blow is inflicted on the person it will look in the way those bruises looked. The skin looked natural all over the body. The black spots around the eyes, I think, could not have come from the same lick that was on the head. She did not bleed to death. The cut behind the ear was two and a half inches from the ear, in the back of the head. There was no penetration of the brain from this cut. I don't know whether the body had been moved before I got there. I can't tell why the body seemed to be contracted. It might have been caused by the agonies of death. She had a young child at this time. The blood was black, but yet fluid. In cases of death by apoplexy I never saw blood flow from the nose, except in the case by drowning ; it is almost always so in that class of cases. I have examined for blood in the case of death by apoplexy produced by drunkenness, and never saw any. A person might fall down cellar and obtain such wounds. The floor of the cellar was yellow clay. There was a little water in some places in the cellar. I saw staves and pieces of wood around the entry of the cellar. All those staves were in their places. There was blood on the hoops of the barrels. The frame of the door was three inch scantling ; edges sharp. The bruises were black and blue. The appearance of the corpse was natural. I am not certain but that the woman might have died of apoplexy. The hair on the stick was the same as that on the head ; of a dark color. The wounds on the breast I do not think would alone have caused her death. The defendant did not particularly describe to me the kind of stick with which he said he whipped his wife when in the calaboose. I tried to make froth come out of her mouth by pressing her breast. I smelt her mouth and there was no sign of liquor. She could not have fallen down the cellar and put blood on the barrels by the

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fall. The blood was on one part of the stick ; it must have come there after the stick was broken. I don't think a person falling on a stick could have discolored it in this manner.

Peter McDonald, a witness, said : Mary McDonald, a witness in this case, is my wife. I knew Ann Mary, wife of defendant. I live about one block from defendant's house. I recollect the time she died. I saw her that day before her death. I first saw her early in the morning about four o'clock ; she was going across her own tillage field. Defendant was there beginning to plow in the end of the field. She was about a couple of perches from Neuslein. I saw her in and out the whole day ; I saw her three or four times from eight o'clock to ten o'clock ; I saw her about nearly ten o'clock standing by her own stack of oats, a little distance from the house. She was going round the stack ; defendant convenient to her. He was standing a little bit from her. She went towards the house ; she just ran out and in. After that time I went over there that day. He came for me about half-past eleven o'clock ; he went before me and was half way between our house and his when I followed him. I went down after him in the cellar ; I saw deceased in his (defendant's) hands. She was dead. He was throwing vinegar or whisky on her and wiping her with a cloth. He asked me to help him to put life in her. I told him he wanted no help ; he had done all the work himself ; I meant he had killed her. He asked me if I would not say she was drunk ? I told him I would say no such thing ; I said I would swear he (defendant) killed her. He said, "Oh ! neighbor, no." I staid there about half a minute and left him there. I went outside, and told my wife to stay there while I called my next door neighbor, and was gone about two minutes. John Carnum and another man was there. I came back to the house. Defendant was shaking deceased upon the floor. I can't say how he hauled her out of the cellar. Staid there a good while, and myself and another man took him to the calaboose. I did not hear him speak any thing more. It was about two o'clock or after when I

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got down to the city hall ; walked all the way down. The folks had a stick when I got back looking at it. Some blood was on the back of the stick, on the end of it. It was broken into pieces. There were two pieces. I saw the coroner fit the pieces together. I saw the wounds on her person. I saw her every day before that. She would be hoeing, &c. She was always attending to things about the garden. I saw them often quarreling. He (defendant) used to strike and whip her. Four or five days before the day she died I saw him whip her. Sometimes I would see him strike her with a bean stick. I saw him strike her three times and then she ran into the house. She would not strike him back. I saw him knock her down with a lump or clod. She staggered and fell against the house. That was Tuesday or Wednesday. Thursday and Friday they plowed, and that day she died. I never saw him strike her with his fist. He struck her on Tuesday ; he struck her with clods or something and she fell over against the wall. She went into the house. Wednesday and Thursday it was with the sticks. They never lived peaceably. I never saw her strike him. She was a little woman, industrious and worked hard. [Cross-examined.] This was in St. Louis county. I was always on good terms with defendant. I can not see all that passed on defendant's premises. Tuesday, Wednesday and Thursday, he beat her or struck her. I don't recollect, in giving in my testimony on the former trial of this case, that I then said this whipping took place four weeks before her death.

John Sterling, a witness for the State, testified : I have known defendant six years. I live about half a mile from him. Ann Mary Nueslien was the name of the deceased. I called her Anna. I recollect the day she died. I arrested defendant. I came out from town between twelve and one o'clock. Some neighbors rushed together there. I asked what was the matter. They told me that the tailor had killed his wife. I asked the reason why they did not take him out. I went in and said, "John, what you doing ? kill your wife?" He said, "no." He was scared. I told him it was no use

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to rub her any longer ; that she would never wake up again. I told him he was a prisoner, and he said he would knock skin off my face ; I and Hans were not able to do it. We tied him with a clothes line, and brought him down to the calaboose. I saw the stick there. I saw him hit her with a hoe. This took place between nine and ten o'clock. [Cross-examined.] I was about two blocks off when I saw him strike her with a hoe. I don't know whether the blow actually struck her or not. She dodged back as if she was struck at.

Mrs. Jane Monan being sworn, testified on the part of the defendant, as follows : I knew defendant and his wife five years. I lived in their house, corner of Tenth and Biddle. I never saw her with the sign of liquor about her more than two or three times. She seemed quiet. I saw her going to her work, stumbling at it. I don't know what his treatment of her was. I knew Nueslein five years, and lived in the same building with him. Nueslein and wife moved away. I never saw her under the influence of liquor but three times ; this was about two or three months before they moved away. The next time was a long time before—about six months between the last time and the time before the last that she was in liquor. I never saw her drink any thing myself. I saw them together often. She did not look like a woman that would drink herself to death.

Ann Maher, for defence, testified that she knew defendant and wife five years. The first time she saw her she was quite drunk. She went there sometimes after vegetables. She saw her fall down on her back, her hands and feet up, and she was struggling about ten minutes before she could get up. She picked up the baby which had fallen from her arms and went to the back of the house.

Charles Farterman stated that he knew the parties about one year ; he lived in a house on Tenth street ; worked for defendant two or three days. Saw her fourteen days or three weeks before she died ; never knew her drunk or be under the influence of liquor.

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Henry Fischer knew defendant and his wife five or six years; never saw her drink or drunk. Saw her every day—sometimes two or three times a day. This was several years ago.

Dr. A. Hammer being sworn, stated that such a wound as described on the head of deceased may produce death, but it is not probable without some predisposing cause in the patient or person thus cut. I should not think such a wound would produce death. Of course he could not speak with positiveness; nor is it possible to do so in such case without a post mortem examination.

This was all the testimony on either side. The court gave the following instructions of its own accord: "The defendant is charged with murder in the first degree, by having wilfully, deliberately and premeditatedly killed his wife Ann Mary Nueslein, by inflicting wounds upon her with a club. The word 'wilfully,' as here used, means intentional, not accidental. The word 'deliberately' means a cool state of the blood—that is, not in a heated state of the blood caused by a lawful provocation; and the word 'premeditatedly' means thought of beforehand; any length of time however short. If you believe that defendant, in malice, did wilfully or intentionally strike and beat and kill deceased with a club as described in the indictment, and that he did so without being in a heat of passion caused by a lawful provocation, and that he thought of beating and killing her beforehand any length of time, however short, then defendant is guilty of murder in the first degree, and so you should find. If you believe that defendant, in malice, did wilfully strike and wound deceased as described, by striking her with a club or stick likely to produce death or great bodily harm, and that he did so without the specific intent to kill her but with the intent to inflict upon her great bodily harm, and deceased came to her death by wounds inflicted under such circumstances, then defendant is guilty of murder in the first degree, and so the jury should find. Malice here mentioned means a condition of the mind and heart void of social duty

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and fatally bent on mischief, which condition is evidenced by former grudges, antecedent menaces and preconcerted schemes to do the party injured some bodily harm; and if you find defendant struck and wounded deceased, as alleged in the indictment, with a stick or club likely to produce death or great bodily harm, the law presumes he struck and wounded her in malice. Although you may believe that deceased was in the habit of getting drunk, and failed to perform her duty as a wife by neglecting or refusing to cook and prepare the meals of defendant, these facts constitute no legal provocation, and passion to mitigate the alleged homicide can not arise therefrom; and if you find that defendant, from either or both of these reasons, wilfully struck and killed deceased with a club likely to kill or cause great bodily harm, with the specific intent to kill or to render her great bodily harm, and that the wounds thereby inflicted caused her death as hereinafter explained, then defendant is guilty of murder in the first degree, and so you should find. And passion, in law, means a heated state of the blood, caused by a lawful provocation; and no heat of passion, to mitigate offence, can be presumed, unless the provocation producing such passion be established by proof in the cause. If you find that defendant beat and wounded the deceased with a club as described in the indictment, or any other weapon or instrument of a similar character, there is no excusable homicide in the case. If you believe defendant killed deceased by blows inflicted with a club not likely to kill or to give great bodily harm, and that he did so without any design to kill her or give her great bodily harm, and that he did so without malice, then the offence is manslaughter in the fourth degree. But if you find that defendant inflicted the wound alleged on deceased, and killed her with malice, then there is no manslaughter in the case. Although you may be satisfied that deceased was laboring under the effects of disease, or was an habitual drunkard, to such a degree as in all probability would have shortly terminated her life, yet if you believe that defendant inflicted wounds as alleged upon de-

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ceased which hastened or accelerated her death, this in the law is a killing of deceased by defendant; and if you find such wounds were inflicted by defendant upon deceased, and that the wounds caused apoplexy or any other disease, and that deceased died of the disease thereby caused, this in law is a killing of deceased by defendant, and you should so find. It is not necessary to a conviction in this cause that defendant's guilt should be proved by an eye-witness thereof. His guilt may be lawfully proven by circumstantial evidence. If you find defendant guilty of murder in the first degree, you will simply state so in your verdict. If you find him guilty of manslaughter in the fourth degree, you will assess his punishment by imprisonment in the penitentiary not less than two nor more than three years, or in jail not less than six months, or by fine not less than five hundred dollars, or by both a fine not less than one hundred dollars and imprisonment in jail not less than three months. If you have a reasonable doubt of defendant's guilt, you should acquit; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching defendant's guilt, and not a mere possibility of his innocence."

The defendant excepted to the giving of these instructions, and asked the following: "The jury are instructed that if they shall find that defendant inflicted chastisement or blows upon his deceased wife anterior to the day on which she died, yet that treatment should have no effect in determining the question of guilt of the prisoner at the bar, unless they shall believe that that treatment accelerated or contributed in some measure to that result;" which the court refused to give, and the defendant excepted.

In this court the defendant's counsel relies chiefly upon the following instructions for reversing the judgment of the Criminal Court: "If you believe that defendant, in malice, did wilfully strike and wound deceased as described, by striking her with a club or stick likely to produce death or great bodily harm, and that he did so without the specific intent to kill her but with the intent to inflict upon her great

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bodily harm, and deceased came to her death by wounds inflicted under such circumstances, then defendant is guilty of murder in the first degree, and so you should find." "If you have a reasonable doubt of defendant's guilt, you should acquit; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching defendant's guilt, and not a mere possibility of his innocence;" and also insists that the court erred in refusing to give the instruction prayed for by defendant.

Let us now examine these instructions. First, I will remark that the instructions must be considered in reference to the evidence offered in the case, and this court will consider the instructions given as an exposition of the law of the case, and ascertain whether the law has been fairly and correctly given to the jury by the whole of the instructions, although some one of them or some part of them may be objectionable. The instruction in relation to doubt is the law, although the word "substantial" is seldom used in connection with it. It means a real doubt of the defendant's guilt; not a mere possibility of his innocence. The common phrase is "reasonable doubt" of the defendant's guilt. If there be such, the jury must acquit. We can not say that the jury were misled by the court informing them that the doubt must be a *substantial* doubt; this did not require any thing more than a reasonable doubt of his guilt. They must doubt of his guilt before they can acquit by reason of such doubt. This doubt must be a real state or condition of the jurors, in which they can not say they feel an abiding conviction to a moral certainty of the truth of the charge. It is not a mere possible doubt. "Such doubt however should be actual and *substantial*; not mere possibility or speculation." (Commonwealth v. Harman, 4 Barr, 270; Pate v. People, 3 Gilman, 644; Wharton's Criminal Law, 327.) It does not imply, as the defendant's counsel supposed it did here, that the jury must not only have a reasonable doubt of the defendant's guilt, but they must have also something more; they must have a belief that he is innocent. The Court only meant to inform

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them that the law required the doubt to be a real one, not a possibility. We must then rule this point against the prisoner.

In looking over the evidence in this case, there can be no doubt but that deceased came to her death by unlawful and violent means. She was bruised all over her body. Her legs, from her toes to her knees, were skinned. There were large bruises on her breast. Her eyes were blackened, and there was a cut or wound on her head just above the right ear, an inch and a half in length, cut into the skull bone. The skull bone was laid open and to be seen. There was a dent, and a sensible one, in the skull. The evidence shows this, in all probability, was made with a piece of undressed plank, about three feet long, two and a half inches broad, and one inch thick. The edges were sharp. The stick or piece of wood was broken in two or three parts; on one of these parts was a bloody spot equal in extent to the wound on the head of the deceased. By applying the stick to the wound the bloody part fitted the cut. There was hair on this part of the stick, and the hair was the same as that of the deceased's head. The prisoner confessed that he whipped his wife with a stick of wood; leaving no doubt upon the minds of every one who heard the evidence, that the piece of wood described by the witnesses was the stick used in producing her death. The witness (the coroner) stated that a good blow with this stick would knock a person down. It was such an instrument as might cause death to be inflicted by its use. It was an instrument calculated to produce great bodily harm; injuries of a serious character, fatal to life, might be caused by its use. Under this state of evidence, was the instruction complained of proper? The jury were instructed that if they believed the defendant in malice did wilfully strike and wound the deceased by striking her with a club or stick likely to produce death or great bodily harm, and that it was done without the specific intent to kill her, but with the intent to inflict upon her great bodily harm, and that the deceased came to her death by wounds inflicted un-

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der such circumstances, then the defendant is guilty of murder in the first degree. This is in accordance with the law as laid down in the case of Jennings v. State, 18 Mo. 441. It is complained of by the counsel in the case now before us, that the phrase, "great bodily harm," was not explained to the jury; that what would constitute great bodily harm was a matter of the law for the court to ascertain, and that it was wrong to leave it for the jury. Such is not our view of the law. What kind of a stick or club is calculated to produce great bodily harm, when used as an instrument, is a matter of fact capable of proof, and the jury is the proper and only legitimate tribunal to ascertain facts, and from the evidence before them they can find out with unerring certainty whether the instrument used is one with which great bodily harm can be inflicted. Homicide, committed in the attempt to perpetrate any arson, rape, robbery, burglary, or *other felony*, shall be deemed murder in the first degree. The wilfully and maliciously inflicting great bodily harm upon another is a felony under our statute of crimes and punishments. Therefore, although the jury may believe that the prisoner did not in this case strike the deceased with the stick with the specific intent to kill her at the time, but with the design maliciously to inflict upon her great bodily harm, and the deceased came to her death by wounds inflicted under such circumstances, then such killing is murder in the first degree.

The court properly explained the law in regard to murder in the instructions given. It explained the terms "malice," "passion," "wilfully," "deliberately" and "premeditatedly." But the counsel for the prisoner contends that the court left it to the jury to find out what was lawful provocation, and that this is error, and Dunn's case, 18 Mo. 419, is referred to. Let us examine this cause of complaint. As remarked before, the instructions must be considered in regard to the facts in proof. Here the only circumstances offered or referred to by the defendant to mitigate his crime, to show provocation on the part of the deceased, were her refusal to prepare his

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meals—to cook his breakfast, as he himself alleged, and her drunkenness. Now, although the court below, in explaining the meaning of the term "deliberately," used the expression "lawful provocation," and also in explaining "malice and passion" used the same expression, "caused by lawful provocation," and did not then tell the jury what was lawful provocation, but left the term unexplained; yet the court afterwards takes up the facts, and the only facts having the slightest bearing on the subject of lawful provocation in the case, and distinctly tells the jury these facts do not in law amount to a lawful provocation. So the jury are not left to fancy, or to imagine, or to grope about in the dark, as to whether there was any lawful provocation in this case or not. It was not so in Dunn's case. There was no instruction there explaining lawful provocation; nor did the court, in that case, take up the facts and say to the jury, these in law are or are not considered as affording a lawful provocation. In Dunn's case too, the court improperly undertook to comment upon the evidence. That case was properly reversed and remanded. It is impossible, in the nature of things, for the court to lay down a rule explaining lawful provocation in every given case. This must depend upon the varied facts and matters introduced in evidence; and when facts are offered in evidence for the purpose of showing a lawful provocation, it is the duty of the court to pronounce whether in law such facts amount to a lawful provocation or not.

In looking over the record of this awful deed, there can not arise a doubt of its being murder most foul and cruel. The poor victim must have suffered much from the inhuman conduct of him who should have stood forth her protector and shield.

The instruction asked for by the defendant was properly refused; that evidence was admitted to show how devoid of all social duty and how bent on mischief the heart must be that could inflict such acts on one standing in so near a relation to the perpetrator. It was not to connect the former cruel deeds with the act producing her death, but to show

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that he who could thus act towards his wife might go one step further. It was to show the probability of her death being caused by her own husband. There was no eye-witness. The murder had to be found out. The testimony had a tendency to point out the actor, was proper and competent for that purpose, and the instruction was not at all calculated to assist the jury in forming a proper conclusion, nor could its refusal operate to the defendant's injury.

We have given the whole case a patient and thorough investigation. We find no error in the court below. We have noted the principal points relied upon by the counsel of the prisoner for a reversal of the judgment, and feel it our duty to overrule them. The minor points we have not regarded as necessary to be here noticed. Upon the whole record, we find nothing authorizing us to reverse the judgment below. The law then must take its course. The judgment is affirmed, Judge Scott concurring. It is ordered that the judgment of this court be certified to the Criminal Court, in order that the sentence of that court may be carried into execution.

THE STATE, Respondent, v. SHOUTZ, Appellant.

1. S., a cripple, deformed from infancy, was indicted for murder; held, that evidence was inadmissible in his behalf to show that by reason of his weak and crippled condition of body he was rendered nervous and peculiarly sensitive to fear from external violence.
2. Where one wilfully shoots and kills another in malice, it is murder in the first degree, and not murder in the second degree.

Appeal from St. Louis Criminal Court.

Cline & Jamison, for appellant.

I. The evidence offered by defendant was clearly competent and should have been admitted. The condition of Shoultz's mind was an important consideration for the jury in passing upon his guilt or innocence. The evidence shows him to be a weak and crippled boy; deformed from his infan-

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cy; always sick and often unable to walk or help himself, and of so frail a fabric that an ordinary blow from the fist of the deceased would have been sufficient to take his life. This had a powerful effect upon his mind, and when he saw his hand raised against him, a sense of his own weakness, heightened by the pain of disease, which had preyed upon him from his birth, moved him to do that for his own protection which is now charged to be murder in the first degree. If the defendant really and honestly supposed deceased intended to do him some great personal injury, and that it was about to fall upon him, although he had no reason for thus supposing, yet if he were to show that his belief arose from his peculiar constitution and character, or from nervousness or cowardice caused by his crippled condition, the homicide in that case would not have amounted to murder, but would have been manslaughter in the fourth degree under our statute. (Whart. on Hom. 212-6; Whart. Crim. Law, 468, note; 3 Stew. & Porter, 815.)

II. The fifth instruction given was erroneous. If the jury should believe that deceased and defendant were of equal strength, then the provocation referred to in this instruction would not extenuate the crime to manslaughter. The same principle should apply to cases where parties are equal in strength as where they are unequal. The instruction also cuts off every defence or palliation which might arise either from passion or self-defence, where the defendant was the first trespasser in a difficulty which resulted in death. No declining the combat, no retreating to the wall or ditch, would be sufficient to protect the accused from the penalty of death; if he commenced the difficulty, it matters not under this instruction how hot the contest may be waged, or how great the peril of the first trespasser might become, yet he is left by this instruction without any means of defence, and can alone seek protection by flight. If the instruction had pursued the language of the law by stating that the provocation must be *sought* by the deceased in order to destroy its legal effect in his defence, then the jury would have understood

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its import, and the appellant would have been left without any reasonable objection to its having been given. The sixth and seventh instructions are objectionable for the same reasons.

III. The eleventh is erroneous. This instruction takes from the jury all consideration of murder in the second degree in every case where death ensues from an intentional act of violence, and unless there be a lawful provocation and a heat of passion, or unless it be done in self-defence, the perpetrator is pronounced guilty of murder in the first degree. The cases of the State v. Dunn, 18 Mo. 419; State v. Jennings, 18 Mo. 443, certainly carried the doctrine to its fullest extent. Here a *wilful* act is held to satisfy a statute which requires the killing to be done with deliberation and premeditation. (See Whart. Crim. La, 439; Copeland v. State, 7 Hump. 479; Whart. on Hom. 168.)

IV. The instructions asked by defendant were improperly refused. (See Granger v. The State, 5 Yerg. 459; State v. Scott, 4 Ired. 409; Whart. C. L. 463; 19 Wend. 569; Shorter v. People, 2 Comst. 197.)

C. G. Mauro, (circuit attorney,) for respondent, cited Whart. on Hom. 215, 197; People v. Clark, 3 Seld. 393; Beauchamp v. The State, 6 Blackf. 310; Mitchum v. The State, 11 Geor. 628; The State v. Tilley, 3 Ired. 424; People v. Shorter, 4 Barb. S. C. 460; 2 Comst. 193.)

RYLAND, Judge, delivered the opinion of the court.

Israel Shoultz was indicted at the July term, A. D. 1856, of the St. Louis Criminal Court, for the murder of Henry Inkamp. At the January term, 1857, he was tried and convicted of murder in the first degree. He moved for a new trial; his motion was overruled, and he brings the case here by appeal.

The record shows the following statement of the facts of the case: Dr. William Taussig, produced and sworn on the part of the State, deposes and says: I am a physician by profession, and reside in Carondelet, St. Louis county. I know defendant Shoultz—ever since I resided there—and was also

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acquainted with Henry Inkamp, the deceased. I was called to see deceased after he was shot; saw a wound on his left side; it was caused by a ball, shot from a gun or pistol, which had passed through his body and came out on his right side, or was protruded through the skin. I took the ball out, and directed some treatment. He died upon Thursday morning from the effect of the shot. I officiated at the post mortem examination. Upon opening the deceased's body, I found that the ball had struck the eighth rib, glanced downward, penetrated the peritoneal coat of the stomach, grazed the walls of the stomach, penetrated the diaphragm, grazed the pleura, pierced the surrounding ligaments of the lungs, and then passed out between the eighth and ninth ribs. This is all I know of the cause. [Cross-examined.] Deceased was a heavy set, strong man; the stoutest man I ever saw. Saw no other wounds upon him except a cut on his right hand; do not know what kind of a cut it was; it was slight however. Shoultz is a cripple; he has the curvature of the spine, and, from his smallness of stature, should suppose he has had it from his infancy.

Dr. Ashbel W. Webster, called and sworn on the part of the State, deposes and says as follows, to-wit: I was called upon to attend deceased. He was at the drinking-house of Stine, in Carondelet; it was some time in the month of —, 1856; saw a cut on his hand; saw the shot wound spoken of by Dr. Taussig. This caused his death. He died in this county, in Carondelet, next day. I knew nothing more of the matter than what has been spoken of by Dr. Taussig.

Michael Conrad, sworn on the part of the State, deposes and says: I knew defendant and deceased also. I saw deceased the day he was shot. It was sometime in the summer in 1856; do not recollect the month or the day of the month. He was at my house on the day he was shot. He was there about three hours. Defendant was passing in the middle of the street in his buggy. Deceased called him off as he was passing. This was one hour before sundown. Defendant got off of his buggy and came in the bar-room, and

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asked deceased what he stopped him for. Deceased asked him, "Do you know of any one who upset my carts and wheelbarrows at the blacksmith's shop on the night of Joseph Shoultz's ball?" Defendant said, "You might as well accuse me of it, as it took place on the night of the ball." Deceased said he merely wished to know if he knew of any one who did it. They got into a dispute and some high words passed. Defendant said he had something against him (the deceased) anyhow. They talked pretty loud in a quarreling way. The young man wanted to fight the deceased; and when they got outside they still talked loud, but soon made it up, and came in and took a drink. Defendant did nothing to Inkamp, but he said half a dozen times he wanted to fight him. Deceased said he did not wish to have any thing to do with him; to keep away from him. They were together about twenty-five minutes; made friends; came in; shook hands, and drank. I think Shoultz paid for the liquor. After this Shoultz started off in his wagon. Deceased was standing in the door or in front of it, on the pavement, when he called Shoultz in. It was done in a friendly way. He was in a laughing way when he spoke to him about upsetting the wagons, &c. Shoultz got mad and said, "You might as well accuse me of doing it." Deceased did not get mad then, nor did he get mad at all. Shoultz remained twenty-five or thirty minutes. I saw deceased on the second night after his being shot. I remained with him until four o'clock in the morning, and was at his funeral. I am not certain that I saw defendant on that evening again. I was not present at the difficulty which resulted in his shooting Inkamp. [Cross-examined by defendant's counsel.] Inkamp did not get mad at all. Shoultz was in the — and treated. I told Inkamp that he would not shoe his mare because he did not send the money, but that it made no difference as he had sent her to St. Louis — Gamache to be shod. Deceased called Shoultz off his wagon. He was going past the house in the direction of his home. Deceased was a blacksmith by trade, and a very stout man—more so than any one in this house. He

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was not born in this country. He was not a Frenchman. He was a German.

Charles Ahlig, sworn on the part of the State, says : I was present at the time Inkamp was shot. It was on the evening of the 9th of June, 1856, at Mr. Stine's bar-room, in Carondelet. I went down there at five o'clock P. M., or a little afterwards, with soda, and to make a settlement; saw defendant and deceased standing near the counter talking with each other. I heard some words, but as it did not concern me I paid but little attention to it. They then came pretty near a fight. I then stepped up to the bar ; was there five minutes, and Shoultz shot Inkamp. I heard many words, but have forgotten them. I heard deceased say it was not right for Shoultz to talk bad of him behind his back ; he was very angry, and would strike his fist on the counter. I think it was his right hand ; and also said that Shoultz was no American, and had no American-feeling heart. Shoultz said, "I will show it to you," and so drew a pistol and shot him. I do not know where he got the pistol from, it was drawn so quickly, unless it was in his coat or pants' pocket. It was pointed at the middle of deceased. They were not more than three paces apart. Deceased was standing near the counter ; and when he was shot, he turned to it and said, "take me out ; I am shot." I saw no blood on him. Shoultz had gone. I do not know where. When I first went in, deceased was standing in front of the counter and leaning against it. He had his arm on the counter, and would turn around and strike with one hand on the counter. Defendant stood in front, face to face. I saw Shoultz at one time jump towards deceased and call him out to fight ; did not notice his hands ; do not know how often he came up in this manner. Deceased said if he was a man who could fight, he would have fought him long ago. Deceased continually made motions with his hands. [Here the circuit attorney offers to read a portion of the examination of witness taken before the committing magistrate, so as to refresh his memory, which was objected to by defendant. The jury being sent out, the paper

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was shown to witness, who states that it was his signature which was appended ; that it was his testimony, and that it was read to him at Esquire Poepping's before he signed it. Here the circuit attorney reads the following to him : " He raised up his fist and went up to deceased and used some threatening language." " Do you now recollect this ? " " I do." Here the jury were brought back, and the witness is asked to state to the jury what he now recollects after hearing that portion of the testimony read ; which is objected to by defendant, and objection overruled and excepted to.] Defendant held his fist up and approached deceased ; do not know how near he held it to him. His fist was not in motion, but his body was ; don't know what he said. Deceased said, if defendant was able to fight, he would have fought him long ago ; that Shoultz was a cripple and could not fight with him ; and if he did, he would be ashamed before every body ; and, as a gentleman, could not do it. This was a few minutes before he was shot. There were six or seven men in the house at the time. The door was standing full of men. The bar-tender was behind the counter. I finished my business. They took deceased out to a grocery below. It was five o'clock, P. M. All this took place in St. Louis county. [Cross-examined by defendant.] I did not see deceased dash the blood at Shoultz or on him ; can't say if Inkamp was drunk or sober. Inkamp did not take hold of Shoultz at the time Shoultz shot. I understand English for all purposes for my business. I am a Hessian ; do not know where deceased is from. I spoke in English when I gave my testimony before Esquire Poepping. I did not see deceased break the tumbler. That was before I came in the room. I did not hear bar-keeper order him out of the house ; did not see deceased have hold of defendant with his hand raised to strike him. The bar-keeper was busy and could not attend to my accounts. I was not talking to any one. My face was turned towards the bar. Shoultz was about three steps from where deceased was standing. I did not see blood thrown on defendant.

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Christian Beck, produced on the part of the State, deposes and says as follows: I am bar-keeper at Mr. Stine's, at Carondelet; was then acting in that capacity when Inkamp was shot. This took place about six or seven o'clock, P. M., in summer last. Shoultz came in the bar-room first; was playing cards, and had been there about thirty minutes before deceased came in and took a drink, and then Shoultz came up with his party and drank also. Some one came along with Inkamp; think it was a wagon-maker. After Shoultz's party had gone out of doors, he went up to deceased to speak friendly with him; he asked him to treat. Deceased said he would not, but at last agreed to it. Defendant said, "If you treat me, you must treat my friends also;" to which deceased agreed. They were called in and all drank. Shoultz asked him again to treat; to which he replied, "I have treated you and your friends, and will not treat no more;" so defendant treated himself and deceased; and what took place here—I did not pay particular attention to what they were saying, but they raised a fuss among themselves; do not know who commenced it. They were standing with their sides to the counter. Deceased said it was not right for defendant to shake hands and then raise a fuss. Shoultz wanted Inkamp to fight him, and jumped at deceased once or twice. Inkamp had a tumbler in his hand, and was going to drink when Shoultz jumped at him. When this was doing, deceased put his glass back on the counter and broke it. I told them both to go out doors and not to raise a fuss in the house. Deceased broke his glass; do not know what he done this for. Defendant wanted to fight, but deceased pushed him away quite easy, and told him to keep free. Defendant said to deceased, "You shall whip me." Deceased said he did not like to fight him, because he was a cripple. Defendant jumped at him three or four times. I did not see him have his hand up. Inkamp was still at the counter and Shoultz was at him all the time. Deceased said he would not fight him, as he was a man who was not able to take care of himself. This he stated five or six times, and both before

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and after he pushed defendant back. They were moving towards the door. Defendant put his hand in his pocket two or three times and pulled it out again. This was about five or ten minutes before the shooting; I heard the shot, and saw defendant pull back his pistol, but was at that moment engaged in putting up the glasses. I did not hear Shoultz say any thing when he shot; but put the pistol in his pocket and walked out the door. Deceased had his hand on the counter at the time he was shot. He put his hand on his side, walked one or two steps towards the door, and then came two men who took him home. I saw him that evening in his own house. He died in two days afterwards; did not see deceased do any thing to defendant all the time he was there. There were many persons there at the time, the most of whom were in the door. I was at deceased's funeral. [Cross-examined by defendant.] I testified in this case before the justice; he wrote my testimony; do not know that he read it over before I signed the paper. I did not say, as it is stated, that deceased took defendant by the body. Deceased was mad at the time he put the glass down on the counter and broke it. It was after this that he pushed Shoultz away. I was standing at the side of the counter, and did not see deceased throw blood in defendant's face. Defendant had one hand in his pocket and came up against deceased. Deceased was a large stout man. I did not see that deceased was drunk.

Joseph Phiper, on the part of the State, being sworn, deposes and says: I live in Carondelet; was at Stine's grocery at the time deceased was shot last June. When I went in the bar, Shoultz went up two or three times to deceased, who said to him he did not want any thing to do with him. I was there about five minutes; was in the act of turning around to leave when I heard the report of the pistol. When defendant fired the pistol he said, "I have shown you if I have an American heart," and then went out of the front door, got into his buggy and went towards home. It was after Shoultz had shot that he said, "I've shown you if I have got an

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American heart." He went before I did. I knew deceased about two months ; was at the post mortem examination. [Cross-examined by defendant.] I have been in this country about twelve years, and have lived in Carondelet about eight or nine years. I testified in this cause before the magistrate ; spoke in the German language.

Christian Grimm, produced and sworn on the part of the State, deposes and says : I knew deceased and defendant ; also recollect the day of the difficulty which resulted in the death of the former. I saw defendant as he drove away from Stine's grocery, and saw the deceased about two minutes after he was shot. Defendant was going towards his house ; deceased was on the pavement about thirty steps from Stine's grocery ; his partner was conducting him home ; saw him the next morning lying on his bed ; heard him make no statement. [Cross-examined by defendant.] I knew deceased about eight years, at his machine shop in St. Louis. I saw Shoultz and several persons on the street ; saw deceased a few minutes before he was shot ; he was talking to his partner ; did not hear what he said. I was in the act of going to the brewery ; heard no one in the grocery as I passed. I know nothing of the shooting. [Re-examined.] Deceased was standing up and talking with his partner, about four or five o'clock in the afternoon ; seemed to be sober ; his name was Henry Inkamp. Here the State closed.

Louis Robear, produced and sworn on the part of defendant, deposes and says : I am the partner of deceased, and remember the day on which he was shot. I was in company with the defendant. I went to Michael Conrad's, and got in with the defendant and rode up to Stine's. After we had been there a short time, deceased came in. A few words passed between him and Shoultz. Shoultz said deceased had not shod his mare right. I said it made no difference as he had won the race at any rate. Some words passed about the cart and grindstone. Deceased asked defendant who turned them over. He said that he did not know ; that he was not in the habit of turning grindstones over. This was at the

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house of Conrad ; don't think any hard words passed between them there. We then left with Shoultz and rode up to Stine's grocery. We played a game of cards ; had already finished, and were getting up to take a drink, when deceased came in. He was invited by some one to join us. We all drank. I then went out doors. We came back again soon. Defendant and deceased now commenced with high words again about the grindstone business and the horse-shoeing. They went on with the excitement, but I do not know what was said. I stood outside of the door, and could not see all, nor hear what was said. I saw a scuffle going on between them ; they were pushing each other at the same time ; did not see the shooting ; heard the report and saw the smoke of the pistol. I saw defendant come out of the house ; saw blood on his face ; saw deceased break his tumbler. They were drinking together. Something arose and he smashed it on the counter. [Here the defendant offers to prove the deceased to have been a man of violent temper and quarrelsome habits, and that such was his general reputation among his neighbors ; all of which was rejected by the court on the ground that it was irrelevant, to which decision the defendant at the time excepted.] [Cross-examined by the circuit attorney.] I have spoken to several persons about this case ; spoke to Primm, Gibau, and several witnesses in the cause. We spoke as to when it would come off—I mean the trial. I went up soon after the difficulty to see Mrs. Shoultz. She sent for me and Mr. Gibau ; we went together. She wanted to hear how it was ; do not recollect what passed. My memory is pretty good. But few words were spoken ; do not know what they were ; defendant has a little brother and some sisters ; first saw Shoultz at Mr. Conrad's, between five and six o'clock ; deceased and a wagon-maker were there ; do not recollect whether deceased stopped defendant or not ; they had a talk about a former difficulty of shoeing a horse. I was out of doors when they made up ; did not see them strike ; deceased and defendant drank with others ; but did not see them drink alone. I think H. Hook treated, but am

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not certain. Defendant invited me and others to get in and ride in his wagon. He went directly to Stine's. I did not know of defendant's having a pistol. It is near half a mile from Conrad's to Stine's. We were about two or three minutes in going up. Four played for the _____. We then drank; deceased came in about the time we finished drinking. Some one asked him to drink, which he did. In about five or six minutes defendant asked deceased to treat, which he did, and we all drank. After Shoultz said, "If you treat me, you must treat all of my friends," deceased said, "call them all up." We all went up. I drank, and so did the others of the party. I do not know how long I remained at the bar; nor did I hear Shoultz ask deceased again to treat. But I saw them again at the far end of the counter; but do not know who treated. I had not been out of the house after we drank up to this time. I think deceased said it was wrong for defendant to pick a quarrel. I was still in when deceased smashed his tumbler on the counter; saw them quarreling close to the door; do not know any of the words that were spoken between them prior to the time the glass was broken; think I heard the bar-keeper say he did not want any noise in the house. I was not watching them all of the time, but they were jawing and making a noise. I may have looked out of the door at that time; did not see Shoultz make a motion or want to fight. They were excited, and I think I saw Shoultz go up to have a fight with deceased; this did not take place more than once. I saw deceased shove him back; this was done in a pretty rough manner; and was ten or fifteen minutes before the shooting. He shoved him back after he had broken his tumber, and told him that he was a cripple. Before the tumbler was broken I came in twice, and during the difficulty saw defendant have one of his hands in his pocket, but saw nothing in it. This was eight or ten minutes before the shot. They moved towards the end of the counter, and at the time of the fussing, I heard deceased say to defendant, "You have not got an American heart," or something to that effect. If I un-

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derstood him, he said, "I will show you if I have got an American heart." This was about the time he fired, and when he went out, he said, "You will see I have got an American heart," or words to that effect. He got in his buggy and drove off; saw him after about 6½ o'clock, Saturday, at the frame house at the corner; did not see the pistol after the shot was fired. I went home; saw Shoultz at our shop. He was acquainted with deceased. Saw defendant have a pistol before when he came to the ——; think on one occasion he had a revolver.

Bartholomew Gihon, of lawful age, sworn on the part of the defendant, states: I am a resident and native of Carondelet, and recollect the time deceased was shot at Mr. Stine's. I was present; it was in the month of June; and was constructing a house in the lower part of the town; and as I was passing went into the bar-room. Saw Shoultz and several others playing a game of cards. After finishing the game, deceased came in. They all went up to the bar and drank. Several of us went out, and defendant called us in to drink a treat of deceased, which we did, but do not know who paid for it. Defendant asked deceased to treat again, which he declined, and defendant then said he would treat; they went up to the bar and loud words ensued. Defendant asked deceased if he still had harsh feelings towards him about the cart and grindstone. Then deceased turned around to the counter, caught his tumbler, and smashed it to pieces on the counter, leaving the indentation there to this day. Then they had many hard and angry words. Deceased had his hand full of blood, and flung it in defendant's face, and took his hands and pulled his hat by the rim down on his face. Shoultz was pale with fear. Deceased was in a great passion, and made at defendant, who told him to keep off of him, and when he came, defendant shoved him away. The *liar* passed between them. Deceased held his fists up near each ear of defendant, and shook the blood from his hand in his face; then they got to shoving each other, and got up to the front door, which was wide open. I slipped out on the

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side-walk and turned and looked in the house ; then Shoultz was to my right and deceased to my left, and facing each other, and both much excited. Then deceased shoved Shoultz with his left hand, and had his right hand raised as if to strike him. Defendant fell back and fired. I could not see him for the door frame. Deceased wheeled round and said, "I am shot ;" and defendant got in his buggy and drove off. Mr. Robear took deceased and started off home. I reside in Carondelet ; am a house carpenter ; am no relation of defendant's. Shoultz is a weak person, and a cripple. Deceased was a stout, robust man, and, in my opinion, could have killed defendant with a single blow of his fist. [Cross-examined by circuit attorney.] He might have struck him before that time if he wished ; deceased pulled his hat by the rim down over his forehead. I have known defendant and his family for ten or twelve years ; am intimately acquainted with them, but had not, to my knowledge, seen Shoultz that day before ; but casually saw him three or four times per week ; saw him once in jail ; had no talk ; several persons were with us at the time ; was there about thirty minutes. I have talked with many persons about it ; have spoken to Robear, but do not recollect what was said. Deceased drank at the bar. I was there about a half an hour or more. I went to the door after we drank ; was engaged in conversation when we were called back by defendant to be treated ; we all went back ; deceased treated, but did not see any one pay for it. We staid a long time after this. About fifteen minutes after this, deceased was again asked to treat by defendant and refused, but defendant said he would treat ; then defendant and deceased drank alone. They soon got to shoving each other ; deceased dashed down his tumbler on the counter and broke it, and cut his hand ; deceased spoke so loud and fast that it was difficult to understand what he said. He spoke of Shoultz upsetting his cart and grindstone. Deceased shoved defendant first, and then defendant shoved him ; they pushed each other four or five times. Robear was there at the time. When deceased hit the counter with the

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glass, the bar-tender said he had been there two or three times already that day trying to raise a fuss; I did not see defendant make a motion at deceased at the time he broke his glass. I heard deceased say once, "You are a cripple boy and I want nothing from you." I paid but little attention as I supposed deceased would do nothing to so small a crippled boy. Did not hear defendant want deceased to fight but once. He said, "Do you want to fight me?" to which question deceased said he did not want to fight: "You are a cripple." This was after the tumbler was broken, and after the shoving; when defendant asked deceased about fighting, I had no idea that he wanted to fight; did not see him have his hands in his pocket. I think deceased said something about defendant's having an American heart; did not hear him say, "I have shown him that I have an American heart." I had some talk with the mother of the defendant on the night of this difficulty. She sent for me and wanted to hear how the trouble occurred.

Thomas W. Levant. I am fifty-five years old; have known defendant from his infancy up to this time. He is about eighteen or nineteen years old; he has always been a cripple, caused by a curvature of the spinal column. He has always and is at this time weak both in health and in strength. [Question. "Do you know what effect the crippled condition of defendant's body has upon his mind as to rendering him more sensitive to external danger and fear?" Objected to as irrelevant; objection sustained by the court, and excepted to by the defendant.] He has always sustained the best of reputation for peace and quietness; is of kind, gentle and amiable disposition; and has always been a pet in the village. I knew deceased. He was a stout man, and had a most violent temper; was generally regarded as a quarrelsome man; do not know that he would inflict great bodily harm or not; have heard many persons say he was a bad man, unruly in his family, and dangerous when in liquor or was drinking.

Peter D. Barada, sworn for the defendant, deposes and

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says : I have lived in Carondelet for thirty-six years ; know defendant. He is twenty-one years old, and has been a cripple from his infancy. He has always borne a good character for peace and quietness. [Question. Does his crippled condition of body render him more sensitive to fear and danger than he otherwise would be ? Objected to for incompetency and irrelevancy ; objection sustained by the court, to which decision of the court the defendant at the time excepted. As the testimony of Gihon seemed to have a tendency to establish self-defence, the court was of opinion and decided that defendant might inquire into the character of deceased as a dangerous man, as tending to show reasonable grounds of apprehension, and submitted proof to that end.] I have known deceased for eighteen months ; he has always borne a bad character for peace and quietness ; and has always been regarded as a bullying and overbearing man ; could not say that he was generally reputed to be a man who would commit great bodily harm. [Cross-examined by attorney for State.] I have heard persons say that he was generally regarded a dangerous man. Some persons who have spoken of his character for these things ; one, his associates, or were at the times I heard them speak of him, among whom was Barada, my son. Never saw deceased more than ten or twelve times, and never saw him guilty of any brutality.

John F. Barada, of lawful age, sworn on the part of the defendant, states : I know defendant, and know that he has always sustained a good reputation for peace and quietness. Deceased was a quick tempered man ; was passionate, and always sustained a poor character for peace ; he would do harm to any one for slight and trivial provocation. There is no doubt but that he would cut or stab a man upon slight or trivial provocation. Such was his general character. [Cross-examined by attorney for State. I had a difficulty with him in February or January last. I went to work for him, and before I found him out thought him to be a very fine man ; have heard some speak well of him, while many have spoken ill of him.

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Constance Shoultz, sworn on the part of defendant, states that she is the mother of defendant; saw him on the morning of the difficulty; he went out in the morning to collect money for Mr. Gamache, and came back in the evening with his face full of blood. He is a cripple, and has been ever since he was two months old; is very weak, and is scarcely able to walk; is very sickly, and quite helpless often from his disease of the spine. When he returned that evening he had blood on his hat, face, clothes and shirt; saw no wounds upon him. Do not know where the blood came from. Saw no wounds on him.

Antoine Motear, sworn on the part of the defendant, states that he has known defendant twenty years; he has always sustained a good reputation for peace; deceased was my neighbor, and was regarded as an overbearing man, of violent passions, and was considered dangerous when drunk. [Cross-examined by circuit attorney.] I never heard deceased would stab, cut or kill any one.

David DeLisle, sworn for defendant, deposes and says as follows, to-wit: I know defendant; he has always borne a good name in the town of Carondelet; deceased was of bad reputation for peace; he was often spoken of as a man of revengeful disposition. [Cross-examined by State.] I have heard Motear's people speak of him and others. Here defendant closed.

Edmond Carroll, called and sworn for the State, in rebuttal, deposes and says: I have heard it stated by men who associated with him, that he was quarrelsome. I was present at the time Inkamp was killed. I stood on the step of the door about ten minutes. I was coming from my mother's; heard quarreling going on in the house, and stopped; was not there when deceased broke his tumbler. Deceased was between the end of the counter and the door; do not know what caused him to leave the counter; saw no efforts on his part to strike or hurt Shoultz in any way. Deceased was greatly excited, and was telling defendant to keep away. Deceased may have raised his hand to strike defendant, and

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I not have seen it; he might have hit him. There was nothing to prevent him. Defendant was near enough to him. There was nothing to have prevented defendant in getting away. I should say if deceased shoved Shoultz I would have seen it; heard no threats made use of by any one. I was attracted off of the street by the loud talk and quarreling. I heard it some three blocks; only heard deceased's voice. I went immediately to the house, and looked in upon the difficulty; did not look at them at the time of shooting.

Jacob Brough, sworn for the State, deposes and says: I knew deceased before he was shot; we worked together in Messrs. Palm & Robinson's machine shop; he had a good character.

George Fox, sworn for the State, deposes and says: I worked in the same shop with deceased; his character was good.

Mr. Conrad, sworn on the part of the State, deposes and says: I know deceased; have heard some persons say he was a rough and overbearing man; but never knew of any thing wrong of him. [Cross-examined by the defendant.] I know Bartholomew Gihon; his reputation for truth and veracity is good, and I would believe him on his oath.

Frederick Guilford, on the part of the State, sworn, deposes and says: I knew deceased nine or ten years before he went to Carondelet to live; he always bore a good character for peace and quiet.

John Wabe, sworn for State, deposes and says: I knew deceased, and believe that he would not hurt any one.

Henry Gilpin, sworn on the part of the State, deposes and says: I knew deceased about nine years; so far as I know his character is good.

Here the defendant offered evidence in rebuttal. Peter D. Barada, of lawful age, sworn on his oath, deposes and says: I would believe Bartholomew Gihon under oath; no one has a better character than he.

Antoine Motear, sworn, states that he knew Bartholomew

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Gihon from his birth ; never heard his reputation impeached for truth and veracity ; no one stands higher in the estimate of the community than he does.

Several other witnesses testified to the same effect as to the reputation of witness Gihon.

This was all the evidence offered on either side. The counsel for the prisoner relies upon the following grounds for a reversal of the judgment : 1st. The refusal of the court below to permit the prisoner to introduce evidence to show that by reason of his weak and crippled condition of body he was rendered nervous and peculiarly sensitive to fear from external violence. 2d. Improper instructions given by the court to the jury on the part of the State. 3d. Proper instructions refused on the part of the prisoner. We will notice these points and give our views concerning them.

It was at one time doubted whether the defendant, in a criminal prosecution, has the right to give in evidence his character. But it may be now considered as settled that the defendant is entitled, in all cases whatever, to introduce evidence of his good character, so far as relates to the subject matter of the prosecution. But his character can only be drawn into issue by himself, and in this he is restricted to the particular trait or quality involved in the prosecution. (Whart. on Hom. 244, 245.) In a trial for murder, "the defendant's peaceableness or regularity of conduct and good feeling towards the deceased would be proper points of defence ; and it would be absurd to divert the issue to other qualities, the *bona fide* possession of which would be perfectly reconcilable with guilt." (Whart. on Hom. 244.) In the case of the State v. Carroll, 3 Humph. 315, the State was permitted to prove the mild and pacific temper and habits of the deceased, for whose murder Carroll was indicted ; and, when this point was insisted on as error in the Supreme Court, that court held that there was nothing in the objection. The court said : "The case depended upon circumstantial evidence, and it was proper to suffer this fact to be proved as a circumstance tending to aid the jury in ascer-

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taining the probable grade of the offence. It would have been competent for the prisoner to have made proof, if he could, of a contrary character, independently of the fact that the State made the proof in question." I would not be understood, by quoting this case, to give sanction to its doctrine, but as showing how far some of the courts have gone on this subject. In 1851, at the Stafford summer assizes, Oxford circuit, in the case of the Queen v. Burt et al., 5 Cox Crim. Cas. 284, indictment for stealing from a dwelling-house, it was held that after a witness had given evidence of the prisoner's good character, it was not open to the counsel for the prosecution to give evidence of the prisoner's general bad character. In the trial of the Commonwealth v. Webster, 5 Cush. 324, Shaw, Chief Justice, said: "There are cases of circumstantial evidence where the testimony adduced for and against a prisoner is nearly balanced, in which a good character may be very important to a man's defence. A stranger, for instance; may be placed under circumstances tending to render him suspected of larceny or other lesser crime. He may show that, notwithstanding these suspicious circumstances, he is esteemed to be of a perfectly good character for honesty in the community where he is known, and that may be sufficient to exonerate him. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things, and beyond common experience—it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind—that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved good character can not avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as where one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. But still, even with re-

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gard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has the right to offer. But it behooves one charged with an atrocious crime, like this of murder, to prove a high character, and by strong evidence to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the government to give in proof the bad character of the defendant unless he first opens that line of inquiry by evidence of good character." I have cited these three cases showing how differently the courts of different states have decided on the question of character. I agree with the doctrine laid down by Chief Justice Shaw. The character of the defendant can only be brought before the jury when he opens the line of inquiry himself.

There are cases in which the character of the deceased may be given in evidence. Whenever, from all circumstances in the case, the defendant may have had reason to be in fear of his life, then the character of the deceased for peace and quietness, or for rashness and turbulent violence and disregard of human life, may be offered in evidence by the defendant as one of the circumstances under which his act was committed, in order to show his grounds of apprehension of great personal injury, or of great bodily harm. The defendant has the right of making this proof, not so much on the ground of its being his right to give the general character of the deceased in evidence, as it is that that character is a fact, a circumstance at the time of the commission of the deed which had its weight in the mind of the defendant in producing the defendant's act. But, as a general proposition, the rule continues unbroken that evidence that the deceased was riotous, quarrelsome and savage is inadmissible, even though such knowledge be brought home to the defendant himself. Any other rule would allow a private citizen to take upon

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himself the province of government in the punishment of crime. (Whart. on Hom. p. 249.)

So much then for the right to give in evidence the general character of the defendant and of the accused. I have thus mentioned the general doctrine on this subject, but there is no cause for it here; for, as soon as the court saw that the defence might properly turn on the doctrine of self-defence, the defendant was permitted to give the general character of the deceased in evidence. But, the defendant proposed to give in evidence his own peculiar sensitiveness to fear from external force, owing to his condition of body. This the court refused, and we think very properly. Wharton, in his treatise on homicide, lays it down as a general rule that there can not be an acquittal unless there is reasonable evidence of the intent of the party on the deceased to commit some felonious act. This evidence must be gauged by the defendant's opportunities at the time; and if he have reasonable grounds to believe a felony intended, it makes no matter that such was not really the case. Thus if a man assaults another with a pistol in such a manner as to produce the belief that he is about to take life, it makes no matter whether the pistol be loaded or not. (Whart. on Hom. 215.) When, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life or to commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended. Wharton says, "it is manifest that very embarrassing questions will here arise as to whether the test to be applied is the defendant's capacity or the capacity of the jury trying the case. If the latter be the case, the question will be of comparatively easy solution. It will be only necessary for the jury to examine the *res gestæ*, and to determine whether, from them, a reasonable belief of an intended felony can be deduced. But if the defendant's capacity is to be taken as the stand point, the inquiry is widely extended. In the first place, it involves the temperament, nervous and intellectual, of the defendant, as well as his means of physical

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resistance. In the second place, it involves the same qualities in the deceased, so far as they could have been supposed to have been known to the defendant at the collision. For, adopting this point of view, it would be absurd to say that a child or imbecile person would not have much greater reason to apprehend a felonious assault from an incensed lunatic, who was starting towards him with the appearance of an assailant, than would the lunatic from the attack of the imbecile or child. And if we admit a distinction in this case, it would be difficult to refuse to receive evidence of the nervous and physical texture of the defendant and the deceased in all other cases. It is clear, however, that to do so would be to yield to a very dangerous latitude in the trial of a case, which would not only require a departure from the established common law principle that the deceased's character can not be brought into controversy, but would open a number of complicated side issues." (Whart. on Hom. 215.) "But no danger can be supposed to flow from this principle, when it is considered that the jury who try the case, and not the party killing, are to judge of the reasonable grounds of his apprehension." Such was the language of Justice Parker, in his charge to the jury, in Thomas O'Selfredge's case. From a careful consideration of this point, after a patient examination of numerous authorities, both in England and in this country, we come to the conclusion that the court below very properly refused to admit the evidence of the defendant, that by reason of his weak and crippled condition of body he was rendered nervous and peculiarly sensitive to fear from external violence. In the case of the State v. Merrill, 2 Dev. 279, Judge Ruffin said: "If the best disposed and most pacific man on earth, without provocation (and words are no provocation), assaults another with an instrument likely to produce death, and death ensues, he is guilty of murder. The law infers the malice from the fact. It must be so, else there is no rule, and all is left to the discretion of a jury. The law infers it, because every man of well regulated mind is obliged to say that in every such case the slayer is a man of

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dark, malignant heart, of ungovernable passions, regardless of social duty, and bent on spilling human blood. In a case of express malice or provocation, the question is for the jury. They are to determine whether the accused acted on the provocation on the sudden, or had the particular ill-will. But where there has been no provocation, or none shown, the only question for the jury is the credit of the witnesses—the perpetration of the fact." In looking into this case we can not avoid the conclusion that this young man most unnecessarily took the life of Inkamp; that there was no danger of any injury being inflicted on him by Inkamp; and that his efforts to provoke the deceased to attack him or to strike him exhibited a heart regardless of social duty, and of a resolution or determination to use his pistol whenever he thought it might be done without too much danger of the consequences to himself. But his ungovernable passions would not permit him to wait until the deceased should exhibit a disposition to attack him. His efforts to excite Inkamp to some threatening attitude were in vain, and after again and again putting his hand into his pocket and taking it out, as if hesitating, he at length draws his pistol and shoots Inkamp and takes his life. I can not see how the jury could have believed the witnesses and have found any other verdict.

The following is the charge given by the court to the jury : " 1. The defendant is charged with murder in the first degree by having wilfully, deliberately and premeditatedly killed Henry Inkamp by shooting him with a pistol. ' Wilfully,' as used here, means intentional, not accidental. ' Deliberately' means a cool state of the blood ; that is, not in a heat of passion caused by lawful provocation ; and ' premeditation' means thought of beforehand, any length of time however short. ' Malice' signifies such a state of disposition as shows a heart regardless of social duty, and fatally bent on mischief ; and ' passion,' sufficient to extenuate homicide, is a heated state of the blood, caused by lawful provocation. 2. Provocation, to be sufficient to mitigate or extenuate homicide, as applicable to this case, should amount to

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personal violence or injury to defendant; mere words of reproach, how abusive or grievous soever they may be, are no provocation sufficient to free the party killing from the guilt of murder. 3. If you find that the defendant did wilfully draw a pistol and shoot and kill Inkamp simply because Inkamp used words of reproach towards him, and that he thought of the killing any length of time, however short, before he shot Inkamp, the offence is murder in the first degree, and so you should find. 4. If you find that defendant wilfully drew a pistol and killed deceased on account of any old grudge, as a matter of revenge or retaliation therefor, then the offence is murder in the first degree, and so you should find. 5. If you find that deceased was greatly superior to defendant in physical strength, and struck or rendered him any other personal violence, such violence in the law is a provocation which extenuates the homicide; but if you find that such violence was brought upon defendant by any unlawful act on his part, then said violence constitutes no lawful provocation, and does not extenuate the homicide. 6. If you find that defendant received such violence at the hands of the deceased, without having brought it upon himself by any unlawful act of his, and thereupon, while in a heat of passion caused thereby, he shot and killed deceased without a design to effect death, but in a cruel and unusual manner, the offence is manslaughter in the second degree. 7. If the killing was committed under the circumstances last above stated, but not done in a cruel or unusual manner, then the offence is manslaughter in the third degree. 8. The law of self-defence is emphatically the law of necessity, to which a party may have recourse under certain circumstances to prevent any reasonably apprehended great personal injury which he may have reasonable grounds to believe is about to fall upon him. If you believe that defendant had reasonable cause to apprehend a design on the part of deceased to commit a felony upon defendant, or to do him some great personal injury, and that there was reasonable cause to apprehend immediate danger of such design being carried out, and he shot

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and killed deceased to prevent the accomplishment of such apprehended design, then the killing is justified upon the ground of self-defence, and you should acquit. 9. It is not necessary to this defence that the danger should have been real or actual, or that danger should have been impending and immediately about to fall. If you believe that defendant had reasonable cause to believe these facts, and he shot under such circumstances, as he believed, to prevent such expected harm, then you should acquit. But before you acquit on the ground of self-defence, you ought to believe that defendant's cause of apprehension was reasonable. Whether the facts constituting such reasonable cause have been established before you by the evidence, you are to determine; and unless the facts constituting such reasonable cause have been established before you by the evidence in the case, you can not acquit in such case on the ground of self-defence, even though you may believe defendant really thought his cause of apprehension reasonable. 10. And if you find from the evidence that defendant and deceased had a difficulty which resulted in the death of deceased, and that defendant commenced the difficulty or brought it on by any wilful and unlawful act of his, or that he voluntarily and of his own free will and inclination entered into the difficulty, then there is no self-defence in the cause, and you should not acquit on that ground; and in such case it makes no difference how eminent the peril may have been in which defendant was placed during the difficulty. 11. If you find that defendant wilfully killed deceased by shooting him with a pistol, there is no murder in the second degree in the case, but the homicide is murder in the first degree, or manslaughter, or justifiable homicide according to circumstances; that is, if he wilfully shot and killed deceased in malice, it is murder in the first degree; if he shot and killed deceased in a cruel and unusual manner, in a heat of passion, as above described, but without a design to kill, it is manslaughter in the second degree; and if he shot and killed deceased in a heat of passion, without a design to effect death, not in a cruel and un-

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usual manner, the offence is manslaughter in the third degree. 12. Good character of defendant, when established, may tend to lessen any probability of guilt which may have been raised against him by the evidence in the cause; but if you are satisfied of the defendant's guilt, you should not acquit, even though you may be satisfied that previously to the alleged homicide he sustained a good character. If you find the defendant guilty of any offence below murder in the first degree, the good character of defendant may properly influence you to assess a lighter punishment against defendant than you otherwise would. 13. If you find defendant guilty of murder in the first degree, you will simply return a verdict stating the fact. 14. If you find him guilty of manslaughter in the second degree, you will assess his punishment by imprisonment in the penitentiary not less than three nor more than five years; and if of manslaughter in the third degree, by like punishment not less than two nor more than three years; or in jail not less than six months, or by fine not less than five hundred dollars, or by both a fine of not less than one hundred dollars and imprisonment in jail not less than three months. 15. If you have any reasonable doubt of defendant's guilt, you should give him the benefit of such doubt, and acquit; but such doubt does not mean a mere possibility of defendant's innocence, but a rational and substantial doubt touching his guilt." To the giving of which defendant excepted.

The instructions given to the jury in every case must be considered by the court in reference to the facts of the case in proof. In this case we have carefully examined the evidence and the instructions, and we consider the instructions given as covering the law of the case; as proper, and tending to assist the jury in forming a right verdict. These instructions laid down the law as favorably as could be required by the defendant. He has no cause to complain that he was prejudiced thereby. In regard to the instructions asked for by the defendant, we consider that the court did not commit error in refusing to give them. The law of the case had been properly laid

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down, and although some of the defendant's instructions may be considered as containing correct principles, yet this court will not reverse for refusing to give instructions when the inferior court has already given sufficient instructions to the jury covering the whole case. What was said by the court in regard to murder in the second degree, we look upon as proper in this case. Here was a deadly weapon ; it was used for the purpose of taking life ; it was calculated for such purpose ; it was used unnecessarily ; it was used deliberately and without a lawful provocation. Malice stares a man in the face who examines this whole transaction. As to the instruction in regard to the constitution of Missouri, that the people's right to bear arms in defence of themselves can not be questioned, and that no presumption ought to arise in the minds of the jury from the defendant's going armed with a pistol, it could not possibly aid the jury in their deliberations. This right is known to every juryman in our state, but nevertheless the right to bear does not sanction an unlawful use of arms. The right is to bear arms in defence of ourselves. There was no injury to defendant by refusing this instruction. We do not consider it necessary to notice the objections made to the refusal to instruct, and to the instructions given by the court below any more particularly. We are satisfied that the law governing the case was properly declared to the jury ; and that the refusal to give the instructions asked for by defendant did not injure him on the trial, or deprive him of any lawful rights in his defence. The number of cases of murder before our court has been unusually great this term. There is a manifest indifference to human life which causes deep and profound solicitude. The duty of the ministers of justice prompts them to a firm and vigorous administration of the law, and mercy to the public requires that where guilt is manifest, punishment should be certain. "He who wilfully and deliberately does an act which apparently endangers another's life, and thereby occasions his death, shall, unless he clearly prove the contrary, be adjudged to kill him of malice prepense." (East's Pleas of the Crown, ch. 5, § 18.) The doctrine of this court—

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as laid down in the cases of the State v. Dunn, 18 Mo. 419, State v. Jennings, 18 Mo. 443, and State v. Hays, 23 Mo. 287, that when it appears from the whole evidence that the crime was at the moment deliberately or intentionally executed, the killing is murder in the first degree—is founded on the proper construction of our statute, and is not repugnant to the doctrine of the common law. This case at bar is not like the case of the State v. Grainger, 5 Yerger, 459. There Grainger used all the means in his power to escape from an overbearing bully. He was shuddering with fear, and his last hope of protection was defeated when Rainey's door continued closed against him, and Rainey did not come to his relief. He shot only to protect his person from threatened violence, and that great. (Judge Catron's opinion, 5 Yerg. 459.) But in this case, I am satisfied Grainger shot without a sufficient provocation, and was not justifiable in so doing; he ought to have been punished at least for manslaughter.

In looking over the case before us, and calmly weighing each circumstance, and giving to each point made the full force which in our opinion it is justly entitled to, we conclude that the judgment below must be affirmed. Our commiseration is alive to the unfortunate prisoner; his youth—his deformity of body—his weakness and sickly habit from his birth up, have all been before us; but the law must be upheld and vindicated. Our duty is a stern and unbending one. We only declare what the law is; we can not alter or modify it. Let the judgment be affirmed; Judge Scott concurring; Judge Leonard absent.

25	156
37a	413
26	156
42a	183

| 25 156
| 32a 100



PAUL *et al.*, Appellants, v. FULTON *et al.*, Respondents.

1. To constitute a person a *bona fide* purchaser for value without notice within the rule that protects such a purchaser the purchase money should be paid before notice is received.
2. A., holding lands in trust, devised them to his executor with direction to sell and convert into personal property; the executor sold and conveyed the

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same ; held, in a suit against the purchaser and the executor to establish the trust, that the heirs of A. were not necessary parties.

3. Where the St. Louis Land Court rightfully obtains jurisdiction in a case, although the facts afterwards disclosed would have authorized a proceeding in another court, the Land Court should furnish relief.

Appeal from St. Louis Land Court.

This was a suit brought by the heirs of Gabriel Paul against William Fulton and Marshall Brotherton, the latter the executor of the will of René Paul, deceased. Plaintiffs state in their petition that on the 20th of August, 1838, they, together with their father, Gabriel Paul, deceased, were the owners of one-half of a certain tract of land, the other half being owned by René Paul and his children; that by virtue of a certain decree of partition said tract was sold by commissioners appointed for that purpose on the 20th of August, 1838, and by agreement between the said Gabriel Paul and René Paul, the said René became the purchaser at said commissioner's sale for the joint benefit of himself and the said Gabriel Paul, and the deed for said land was made to René Paul by said commissioners for the benefit of himself and the said Gabriel Paul; that at the said sale the said René Paul paid no money for said land, but that the same was purchased by him in his own name for the joint benefit of himself and the said Gabriel; that no part of said consideration was ever paid to these plaintiffs; that plaintiffs are the only heirs of Gabriel Paul; that René Paul, by his last will, devised all his estate, real and personal, to his executors, Marshall Brotherton and Archibald Gamble, of whom only the first named qualified; that said Brotherton, by virtue of the power conferred upon him by said will, conveyed one-half of said tract of land to William Fulton, and the other half to the trustee of Louise Gosnell, wife of George W. Gosnell; that said Louise and her trustee conveyed their half to the said Fulton; that said Fulton and said Louise Gosnell, who was daughter and heir of René Paul, had full notice of the equitable title of plaintiffs at the date of their purchases. "Plaintiffs therefore pray that said defendant Fulton be declared a

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trustee for the plaintiffs for one-half of said tract of land, and that he be required to convey to the said Estelle, Adolphe and Therese, the said one-half of said land. If, upon trial, it shall appear that said Fulton has been a purchaser of any part of said land without being chargeable with notice, then the plaintiffs pray that for such portion the said Brotherton be required to account for and pay to the plaintiffs the same proportion of money for which he sold the said land, to-wit: \$5150.80."

Fulton, in his answer, denies all knowledge of the alleged purchase by René Paul for the joint benefit of himself and Gabriel Paul; admits the purchases alleged from Brotherton and Mrs. Gosnell and her trustee; but "denies that at the time he made said purchase he had any notice whatever of any title of plaintiffs to said land, either legal or equitable."

Brotherton, in his answer, denied all knowledge of the trust.

The cause was tried by the court sitting as a jury; its finding of the facts is set forth below in the opinion of the court. A motion for a review filed in behalf of plaintiffs was overruled. Service of process was had in this suit upon defendant Fulton, August 2, 1855, and upon Brotherton August 9, 1855.

Whittelsey, Glover & Richardson, for appellant.

I. Gabriel Paul, in his lifetime, was the equitable owner of one-half the land, and was entitled to a conveyance therefor. This equity descended on the plaintiffs, and they can enforce it against any one holding the legal title who is chargeable with the trust.

II. The legal title is in Fulton, and he ought to be compelled to convey one-half the land to the plaintiffs unless he can shield himself under the guard the law furnishes to the *bona fide* purchaser for a valuable consideration without notice. Fulton does not by his answer or the proof secure the protection of a purchaser without notice of the outstanding equity. Notice before the payment of the purchase money

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is equivalent to notice before the contract. (7 Mon. 597; 2 White & Tud. L. Cas. 77; Halsa v. Halsa, 8 Mo. 303; 8 Wheat. 421; 7 John. Ch. 65; 1 Johns. Ch. 288; 3 Atk. 304; Boone v. Chiles, 10 Pet. 211; 4 Dess. 287.) Mrs. Gosnell was a volunteer. She paid nothing, and receiving a portion of the land as a part of her distributive share of her father's estate, she took it with all the equities charged upon it. Taking property in payment of a precedent debt does not make the buyer an innocent purchaser as against the holder of a prior equity. (Rowan v. Adams, Sm. & Marsh. Ch. 49; 4 Scam. 390; 4 Paige, 215.)

III. Proper parties were before the court, and if they were not the court ought not for that reason to have dismissed the cause. (19 Mo. 403; Pract. Act, 1849, art. 3, § 10.) The plaintiffs being heirs of Gabriel Paul were proper parties plaintiff. Fulton was a proper and necessary party defendant. Under the code of 1849 a suit should not be dismissed for want of proper parties, provided there is one proper plaintiff and one proper defendant. René Paul, by his will, directed that his real estate should be converted into money by his executor, and as to his heirs it should be treated as chattels, and represented by his executors. Brotherton was a proper party, and for another reason, that complete justice might be done to all the parties, which might require Brotherton to surrender to Fulton the notes which represented one-half the purchase money.

T. T. Gantt, for respondent.

I. The petition is in the alternative and asks for one of two forms of relief, which is inadmissible. (Robinson v. Rice, 20 Mo. 229.)

II. In the hypothesis that plaintiffs are entitled to recover land, they are entitled to recover against the legal tenant, Fulton; and the Land Court has jurisdiction, but Brotherton is not a proper party to the action, and the heirs of René Paul are.

III. In the hypothesis that is suggested secondly in the petition, the personal representatives of Gabriel Paul will be

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perhaps entitled to a sum of money, but they are not parties to the record, and the Land Court has no jurisdiction of a money demand; so that in no case can the Land Court give the required relief.

IV. The court found that Fulton was a purchaser for value without notice. The land then is out of the reach of the heirs of Gabriel Paul; for in this case the petition waives all claim to the land, and asks for money only. Fulton paid to Brotherton one-half the purchase money for the moiety which he bought in 1852, and has paid Gosnell, making three-fourths of the money paid by Fulton.

RYLAND, Judge, delivered the opinion of the court.

In this case, the court below should have sustained the plaintiff's motion to review the finding of the facts made by the court in respect to the question of the trust in favor of the plaintiffs, and also in regard to notice by Fulton. The court omits to find any thing in respect of the interest, title or estate of the plaintiffs, the heirs of Gabriel Paul, in and to the lands or the money arising on its sale. The finding shows "that in June, 1837, René Paul and his children, Gabriel R. Paul, Edmund W. Paul, Emilie Paul, Louise Paul, Tullia Paul, and Julia S. Paul, were tenants in common with Gabriel Paul and his children, Adolphe Paul, Estelle Paul, and Therese, in the lands and premises in dispute; that certain proceedings were had in a suit in partition between these tenants in common, and that the land was sold by commissioners appointed for that purpose, and that René Paul became the purchaser in August, 1838; that René Paul received a deed from the commissioners for the land; that Paul paid no money to the commissioners for the land except the costs of the proceedings in partition; that at the time of the execution of the deed by the commissioners to said Paul, it was understood that he was to furnish to them the receipt of himself and his brother Gabriel for the amount of the purchase money of said land; that one-half of the amount paid by said René Paul for the costs of said partition suit was af-

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terwards paid to him by Gabriel Paul ; that neither René or Gabriel ever paid any money on said sale, except the costs of said suit ; that on the same day of the date of the deed from the commissioners, August 21, 1838, René Paul declared in writing that the purchase of said land at said commissioners' sale was made on the joint account of himself and Gabriel ; and René Paul again, in April, 1841, stated, in a memorandum addressed to Gabriel, that said Gabriel had one-half interest in the land in question ; that during all this time, and up to August, 1843, there were transactions between the brothers Gabriel and René, in regard to the purchase and sale of lands, both in the city and county of St. Louis, on their joint account ; that on the 14th day of August, 1843, René Paul claimed a balance as due to him on account of their general transactions. Gabriel Paul died in 1846, leaving heirs, Adolphe, Estelle and Therese ; and René Paul died in May, 1851, leaving heirs, Gabriel R., Edmund W., Emilie, Louise and Tullia ; that René, by his will, (after specifically devising one lot of land,) directed his executors to sell and convey absolutely all his remaining real and personal estate, and directed the disposition of the proceeds thereof ; that in June, 1852, in pursuance of the directions contained in said will, the defendant, Marshall Brotherton, sold and conveyed the land in question to Wm. Fulton and the trustee of Louise A. Gosnell, wife of George Gosnell, and daughter of René Paul, for the sum of \$5,150.80 ; that in payment for the same, the receipt of Mrs. Gosnell and her husband was taken on account of money coming to her under her father's will for a portion of the purchase money, and for the balance notes were taken, and that there is still due and unpaid of said purchase money the sum of \$2,575.40 and interest thereon ; that on the 6th day of May, 1853, Louise Gosnell conveyed her interest to said Fulton ; that neither said Fulton nor Louise Gosnell had any actual notice of the claims of the plaintiffs to said land until the commencement of this suit ; and that Gabriel and René Paul were at variance for many years, and were reconciled to each other about one year be-

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fore the death of Gabriel. Thereupon the court declares that the plaintiffs are not entitled to the relief asked for in this petition against the defendants."

It will be seen from the finding that the court does not touch the subject of the trust—does not, except by inference, state any thing about the rights of claims of the plaintiffs. The land was sold under partition proceedings, bought by René Paul for himself and his brother Gabriel, on their joint account. A deed was made to René Paul alone. No money was paid by either of them for the land—nothing except for costs of suit in partition. The deaths of Gabriel and René Paul follow after some years, without showing any change in their rights to the lands. Now there can not be much doubt but that Gabriel Paul must in equity be considered an equal owner with his brother René of the lands bought at the commissioners' sale. The heirs of each must succeed to all the rights of the ancestors. The finding of the court in regard to the plaintiffs' right to the lands should have been made, and it is erroneous to leave that important matter alone to inference.

In regard to the notice to Fulton, the court ought also to have sustained the motion to review. From the evidence presented in the record in regard to this fact, there can be no doubt of his receiving notice of the claim of the plaintiffs before he paid any part of the money; indeed, half the purchase money is still due and unpaid. Fulton can not, under such circumstances, be considered a purchaser without notice. Upon the point of notice to Fulton the authorities place the matter beyond question. Here the plaintiffs claim only one-half of the land purchased by Fulton; or if he be viewed in the light of an innocent purchaser for valuable consideration, then only half the amount of the consideration money for which the land was sold by Brotherton. The suit in this case was actual notice, and when it was commenced, Fulton had not paid more than half the purchase money for the land. The English equity doctrine is, that for the purchaser to be considered entitled to the favorable posi-

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tion of one buying without notice, there must be an entire payment in full of the consideration money, and the reception of a deed or conveyance from the grantor; that the sale must be consummated and completed on both sides before notice given or communicated. In the United States the doctrine has not been quite so rigid. Payment in full, without a deed, has been considered enough to protect the purchaser before notice, and even it has been held that payment in part has been considered in some cases sufficient to protect him for so much or such portion.

We are at a loss to ascertain the grounds on which the court below decided the case. The ~~law~~ ~~and facts~~ by the Court, strip the defendant Fulton of all right to be held as an innocent purchaser without notice. The claim of the plaintiffs does not seek for more than half the land, or half the purchase money. Fulton has not yet paid more than half of the purchase money; so, giving to him the most favorable position that has yet been allowed by any of the courts of our sister states, and he can not be considered an innocent purchaser without notice in this case. "It is well settled, moreover, that to entitle a purchaser to protection the consideration of the purchase must not only be valuable but must have been wholly or partially paid or executed. Vattier v. Hude, 7 Pet. 252; Doswell v. Buchanan's Exec'r, 3 Leigh, 365; Dellard v. Crocker, 1 Speer Eq. 20; Bash v. Bash, 3 Stobhart's Eq. 131; Kyle v. Tait's Adm'r, 6 Grat-tan, 44; Cole v. Scott, 2 Wash. 141." (2 White's Lead. Cas. in Equity.) It is held both in this country and in England that actual payment is in general necessary to the character of a purchaser for valuable consideration; and that giving security or executing an obligation for payment will not be sufficient. (High v. Batte, 10 Yerg. 555; Christie v. Bishop, 1 Barb. Ch. 105; Murray v. Ballou, 1 Johns. Ch. 566; Hunter v. Sumrall, 8 Littell, 62.) Payment in bills or notes of third persons will however be equivalent in most cases to actual payment, (Jewett v. Palmer, 7 Cow. 651); and the same effect would seem to be due to payment in the notes of

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the purchaser, if negotiable in their character and actually negotiated so as to render him liable to pay them at all events. (*Frost v. Beekman*, 1 Johns. Ch. 288; *Freeman v. Deeming*, 3 Sandford, 327; 2 White Lead. Cas. Eq. 113.) In *Wormley v. Wormley*, 8 Wheat. 449, Mr. Justice Story said: "It is a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but must be so at the time of the payment of the purchase money."

We do not consider it necessary here to make the heirs of René Paul defendants. The land sold and sued for in this action was sold under the will of René Paul by his executor—the will directing the sale of all his remaining property, after a special legacy of a lot, and directing a distribution of the proceeds. Fulton was a proper party; so was Brotherton, the executor; but we can not see any objection to the relief sought for by the plaintiff by reason of their failure to make the heirs of René Paul parties defendant.

The petition sets out facts showing a case fully within the jurisdiction of the Land Court. That court then had jurisdiction at the commencement. Now if, in the progress of the case, the facts should so turn out that some other court might also lawfully entertain jurisdiction and give the relief, yet, in the opinion of this court, this circumstance does not and should not deprive the Land Court of its jurisdiction and authority to go on with the case, and give the relief which the nature of the facts and circumstances require. Having once obtained jurisdiction in the case, if the facts afterwards disclosed would, if known, have authorized a proceeding, differently instituted, in another court, still the Land Court should go on and settle the controversy, and not stop short and turn the plaintiffs out to seek a new jurisdiction at the expense of two suits, when one might answer. The judgment below is reversed, and the cause remanded; Judge Scott concurring; Judge Leonard absent.

HAMILTON, Respondent, v. SCULL'S ADMINISTRATOR, Appellant.

25	165
107	228
25	165
110	604
25	165
181a	445
25	165
85a	411

1. It is a good defence to an action on a promissory note that it was given to the plaintiff in furtherance of an attempt on his part to defraud his creditors.
2. The fact that depositions offered in evidence may contain incompetent and illegal evidence will not justify the rejection of them altogether. The court should point out and exclude the inadmissible portions.

Appeal from St. Louis Circuit Court.

This was a suit to establish against the estate of Joseph P. Scull, deceased, a demand of \$1124.06, being the balance alleged to be due upon a promissory note for \$7097.25, executed by said Scull. At the trial in the Circuit Court the plaintiff proved the execution of the note. The defendant then offered in evidence the depositions of Sterling H. Tucker and James Scull, tending to prove that the consideration of the note was fraudulent in this, that Hamilton, the payee, had made a fraudulent sale of a stock of goods to Joseph P. Scull, to hinder, delay and defraud his (Hamilton's) creditors, and that Scull had executed and delivered said note to Hamilton for the purchase money. The court, on motion of plaintiff, excluded the depositions.

Garesché (defendant) and *Buckner*, for appellant.

I. The maxim "*in pari delicto potior est conditio defendantis*" applies to this case. It may be well held that the defendant would not be permitted to show, as a substantial ground of defence, that the note was made to delay and defraud creditors, on the well known maxim "*nemo allegans suam turpitudinem audiendus sit*," but want of consideration is shown, and it is the plaintiff who seeks to rebut this defence by insisting that the depositions tend to show that the notes were executed by him to defraud his creditors. The nature of this transaction is necessarily brought out in the attempt to prove want of consideration, a legitimate defence, and if incidentally the character of the transaction is also

Hamilton v. Scull's Adm'r.

shown, the plaintiff should not be allowed to benefit by it upon the rule "*in pari delicto potior est conditio defendantis.*" (See Wearse v. Pierce, 24 Pick. 141, and cases cited.)

L. K. Kinsey, for respondent, cited Brown's Adm'r v. Finley, 18 Mo. 375.

SCOTT, Judge, delivered the opinion of the court.

This was a suit begun in the Probate Court of St. Louis county for the purpose of establishing a demand against decedant's estate—being a balance on a note executed by the intestate to the plaintiff. Garesché, the defendant, offered evidence tending to show that the note had its origin in a fraudulent combination between the parties for the purpose of defrauding the creditors of plaintiff. This evidence was rejected and the defendant excepted.

There is no doubt of the correctness of the principle asserted in the case of Brown's Adm'r v. Finley, 18 Mo. 375, that one who has made a fraudulent conveyance of his property can not, by alleging his own turpitude, be permitted to set aside his conveyance, and regain the possession of property which he has fraudulently aliened. To do this would be encouraging fraud, for thereby a party would be induced to make fraudulent alienations without any concern for the consequences, confiding in the privilege the law would confer of setting them aside afterwards, if they did not answer the ends proposed by them. In such cases the maxim applies, "*nemo allegans suam turpitudinem est audiendus.*" Having fraudulently passed away his property, the act is consummated—the deed is done; and the law will not relieve him from a situation in which he has been placed by his own fraud. But the case under consideration is different from that stated above. Here the act is not consummated. This is but a promise, and the law allows the turpitude of the transaction to be shown with the same view as in the preceding case, to take away inducements to fraudulent conduct. What would give greater encouragement to fraud than for courts of jus-

State v. Buckner.

tice to lend their aid in carrying them into execution? But though the law suffers the transaction to be inquired into in the one case, and will not permit a party to expose his fraud in the other, yet this apparently inconsistent course arises from the different stages of the illegal acts at the time the inquiry is proposed, and is necessary to fulfill the purpose of the law with regard to fraudulent contracts, which is to refuse all aid to the parties thereto in carrying them into execution; for it will be observed that in this case, while the law permits a party to raise the question of fraud, it is only done that it may, when the fact is established, refuse its aid to the party who has been concerned in it, and leave him just where he placed himself by his ill conduct. So in the end, through this seemingly inconsistent course, the law produces the same result in each case, which is a denial of all assistance to those who will soil themselves with a foul transaction. (Chitty on Contracts, 680.)

If the depositions contained any illegal evidence, that was no reason for rejecting them altogether. If any portion of them was proper evidence they should have been received, the court at the time pointing out the portions excluded. Judge Ryland concurring, the judgment is reversed and the cause remanded; Judge Leonard absent.

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THE STATE, Respondent, v. BUCKNER, Appellant.

1. In the case of an indictment for murder the defendant is entitled to a panel of thirty-six jurors; also to have a list of such jurors delivered to him forty-eight hours before the trial. The "Act to regulate and pay grand and petit jurors in Stoddard county," approved February 18, 1855, (Sess. Acts, 1855, p. 581,) does not in any way affect these rights.
2. The revised code of 1855 governs such proceedings had after May 1st, 1856, although the indictment was pending previous to that date. (See State v. Phillips & Ross, 24 Mo. 475.)
3. If a regular panel of jurors be exhausted before a jury is obtained, the defendant is not entitled to have any particular number of by-standers or tale-men summoned from which to complete the jury.

State v. Buckner.

4. Where an affidavit for a continuance is filed, the court should not permit it to be strengthened by other affidavits of the same person.
5. In the case of an indictment for murder it is error to receive a verdict of the jury in the absence of the defendant. He must be personally present, not only during the trial, but at the time of the rendition of the verdict.

Appeal from Stoddard Circuit Court.

The facts sufficiently appear in the opinion of the court.

C. G. Mauro, (circuit attorney,) for the State.

Ryland, Judge, delivered the opinion of the court.

Sarah Buckner was indicted at the March term of the Bollinger Circuit Court, in the year 1855, as principal in the second degree of the murder in the first degree of Whiston Buckner. On the application of the prisoner the venue was changed to the Circuit Court of Stoddard county. The trial of the cause was postponed from term to term until the May term, 1856. At this term the prisoner moved for a continuance, and the record shows that she filed three different affidavits in support of the motion. This motion was overruled, and the defendant excepted, and saved the point by a bill of exceptions. This point will be noticed hereafter. When the trial was ordered the record shows that the prisoner by her counsel "moved the court to order the sheriff to summons a jury of thirty-six to try this cause," which motion was overruled, and excepted to, and this point was saved by the defendant by bill of exceptions. The bill of exceptions shows that the prisoner moved the court to order the sheriff to summon thirty-six venire men, out of whom a jury might be selected; and "that she might be furnished with a copy of the names of those summoned forty-eight hours previous to the trial; but the court refused to order the sheriff so to do, and decided that, under the laws regulating jurors in Stoddard county, she was not entitled to have the said number of jurors expressly summoned, and was not entitled to a copy of the panel forty-eight hours; but defendant's attorney could obtain a copy any time from the clerk." The record

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also shows "that during the progress of impanneling the jury, the regular panel of twenty-seven being exhausted, and the accused having challenged peremptorily but six, and one juror being still wanting, the defendant moved the court to direct the sheriff to summons fourteen jurors, which motion was overruled, and excepted to." This point also saved by bill of exceptions.

There were divers matters in regard to questions proposed to some of the witnesses, which the court overruled, and which were excepted to; but we consider them of no importance. The jury found the defendant guilty of murder in the first degree. This verdict was rendered in the absence of the prisoner. The sheriff, when called on to produce her in court in order to hear the verdict, replied to the court that the prisoner had escaped from his custody, and that he could not then produce her in court. The court received the verdict and discharged the jury: During the term the sheriff again brought the prisoner into court. She moved for a new trial; which being overruled, she excepted, and prayed an appeal to this court. The court below passed sentence upon the prisoner, but ordered the same to be suspended until the judgment of this court be had upon the premises. The appeal was taken at the May term, 1856, and the record filed in this court on the 9th day of June, 1856.

The record in this case is presented without any brief or without the appearance of any counsel. In examining this record we come to the conclusion that the court below erred in refusing to direct the sheriff to summons thirty-six venire men out of whom a jury might be impaneled; also erred in refusing to direct that a copy of this venire be delivered to the defendant or to her counsel forty-eight hours before commencing the trial. The "Act to regulate and pay grand and petit jurors in Stoddard county," approved February 13th, 1855, does not take away the right of the defendant to challenge peremptorily twenty persons summoned as jurors in trials for murder; nor does it pretend to take away the right of the accused to have a copy of the venire, from which the

State v. Buckner.

jury is to be sworn, forty-eight hours before commencing to impanel the jury. The statute concerning practice in criminal cases (art. 6, § 6,) gives to the State the right, in all criminal trials, to challenge peremptorily four jurors. Section 7 declares that "there shall be summoned and returned, in every criminal cause, a number of qualified jurors equal to the number of peremptory challenges, and twelve in addition; and no party shall be required to make peremptory challenges before a panel of such number of competent jurors shall be obtained." Section 8. "A list of the jurors summoned shall be delivered to the defendant in the cases specified in the two first subdivision of the fourth section of this article, at least forty-eight hours before the trial, and in other cases before the jury is sworn, if such list be requested." Section 4, first subdivision: "If the offence charged is punishable with death, or by imprisonment in the penitentiary not less than for life, the peremptory challenges shall be twenty, and no more, allowed to the defendant." The crime of murder charged in the indictment in this case is punishable with death. Then the accused is allowed to challenge twenty peremptorily—the State four—making twenty-four challenges, and twelve in addition—making thirty-six. This number is required to be summoned in all such cases; and in order to make this right of challenge beneficial to the prisoner, she has the right to a copy of the list of the thirty-six forty-eight hours before the trial. The statute concerning practice in criminal cases was approved December 8, 1855, is subsequent to the "jury law" of Stoddard county, and where these two laws are irreconcilable, the last must prevail. It is our duty to reconcile these laws as far as we can consistently do so; but when this can not be done, the former must succumb to the latter. I suppose it never entered into the head of a legislator that by passing the jury law of Stoddard county, he intended thereby to deprive the citizen of the most important privileges guarantied to him by the general law—of the right to challenge in trials for murder, and of the right to exercise this challenge judiciously by having a copy of the

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list of the jurors for forty-eight hours at least before he should be called upon to challenge. This is the law governing the selecting and impanneling a jury in a case of murder, whether we consider the proceedings under the revised code of 1855 or revised code of 1845. In the revised code of 1855, the fourth section is obviously meant instead of the third section of article six. I have referred to the fourth instead of the third. The revised code of 1845 refers to the third section very properly ; but in 1855, it is the fourth section and not the third. I have been thus particular in order to let the court below see we noted the mistake. The proceedings in this case are governed by the laws revised in 1855. (See R. C. 1855, p. 1025, § 16.) The refusal to order the sheriff to summons thirty-six jurors and to give defendant a list of the persons thus summoned forty-eight hours before the trial commenced is error ; and there is no knowing how seriously this error may have injured the defendant. This court said, in the case of the State v. Samuels, 3 Mo. 68, that it was not necessary for the court to have a writ of *venire facias* issued to the sheriff, or to have an order entered on the records of the court requiring him to summons such a venire of jurors ; but for the court to order or direct the sheriff *ore tenus* would be sufficient.

There is nothing in the point complained of by the defendant in regard to the sheriff's not being ordered to summon fourteen by-standers or talesmen and giving a list of them to defendant. Whenever there has been a proper panel summoned and the defendant has been properly furnished with a list of the panel, and such panel becomes exhausted before a jury be made up, then in summoning from the by-standers there is no law requiring any particular number to be thus summoned, and none requiring a list of them, when summoned, to be furnished to the defendant.

The record shows that the prisoner filed three different affidavits for a continuance. This shows a very loose practice, and the affidavits are drawn very carelessly—without precision or skill. Had the matters set forth in these vari-

State v. Buckner.

ous affidavits been properly presented, we think that the court should have granted a continuance. Surely the mistake in the clerk who issued the subpoena commanding the witness to attend on the 18th of May, 1856, which is alleged to be a Sunday or Sabbath day, instead of on the 19th of May, the day the court commenced its session, could have afforded no reason sufficient to disregard that subpoena, and the mere mistake in the given name of the witness could not have justified the court in disregarding such subpoena. This court does not countenance the practice of filing affidavit on affidavit for a continuance. Let the party state the facts on which she relies for a continuance distinctly and fully at first, and not resort to the practice of mending affidavit after affidavit as soon as the views of the court become known in regard to the sufficiency of the same. I mention this matter in order that it may be avoided in future. The best practice is not to permit an affidavit for a continuance to be strengthened by one or more affidavits of the same person. Let parties make full statements at first.

In regard to the receiving of the verdict of the jury by the court in the absence of the prisoner, we think this is a fatal error. Our statute expressly declares "That no person indicted for a felony can be tried unless he be personally present *during* the trial." (R. C. 1855, p. 1191; Practice in Criminal Cases, art. 6, § 16.) "The verdict, in all cases of felony and treason, must be delivered in open court in the presence of the defendant." (1 Archb. C. P. 173, note 2.) "The verdict, whatever may be its effect, must in all cases of felony and treason, be delivered in the presence of the defendant in open court, and can not be either privily given or promulgated while he is absent; and in all cases where the jury are commanded 'to look on him,' as in larceny, and all accusations subjecting him to any species of mutilation or loss of limb, the same rule applies, without exception." (1 Chitty's C. L. 636.) In the case of the State v. France, 1 Overton, (Tenn.) 434, the court said: "The prisoner must be at the bar; otherwise the jury could not be asked for their

State v. Timmerberg.

verdict; and if he does not appear, the jury must be discharged without rendering any verdict. In every case affecting life or limb, the accused must not only be present when the evidence is given in, but during the trial, and on return of verdict." In the case of the People v. Perkins, 1 Wend. 91, the court said: "We are of opinion that the verdict was irregular. The prisoner was indicted and tried for an offence formerly called capital; and though many of the ancient forms on trials are now dispensed with, the prisoner should have been present on receiving the verdict, so that he might have availed himself of the right of polling the jury." In Nomaque v. The People, 1 Ill. 109, similar doctrine is held. We therefore think that the court had no right to receive the verdict of the jury in the absence of the prisoner in this case.

The record shows no instructions—no evidence saved. We have examined the record carefully, and it is our opinion that the court below committed errors in the various particulars pointed out in this opinion. The judgment must therefore be reversed, and the cause remanded, to be proceeded with according to the principles laid down in this opinion; Judge Scott concurring; Judge Leonard absent.

THE STATE, Respondent, v. TIMMERBERG, Appellant.

1. Judgment affirmed; no bill of exceptions filed.

Appeal from St. Louis Criminal Court.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted in the Criminal Court of St. Louis county for feloniously, unlawfully and maliciously wounding cattle—the property of Robert McClish. He appeared to the indictment and pleaded "not guilty;" was tried and convicted of the offence, and sentenced to three months'

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imprisonment in the county jail, and to pay a fine of one hundred dollars. He moved for a new trial; his motion was overruled, and he brings the case here. In examining the record we find no bill of exceptions saving any point in the ruling of the Criminal Court; no evidence preserved on which the motion for new trial was made; nor any other ruling of the court saved by exceptions. No counsel appears here for appellant, nor is there any brief filed on his behalf; nevertheless we have examined the record of the proceedings and we find no error committed by the court, and we consider the indictment sufficient to sustain the judgment of conviction. The judgment must therefore be affirmed; the other judges concurring.

THE STATE, Respondent, v. DEVLIN, Appellant.

1. One A. was put upon his trial for an alleged misdemeanor; after the evidence on both sides was closed, the court refused to submit the case to the jury as requested by A., and against objection on his part called the next cause on the docket, being a case of misdemeanor, and empanneling the same jury heard the evidence in the same, and submitted both causes to the same jury at the same time. Held, that the court committed error.

Appeal from St. Louis Criminal Court.

This was a prosecution for an assault and battery originally instituted before a justice of the peace. The cause was taken by appeal to the St. Louis Criminal Court. The defendant, Charles Devlin, was put upon his trial in the Criminal Court, and evidence having been given on both sides, the case was closed. The court then called the next cause on the docket, which was a case of misdemeanor, and the same jury was sworn in said second cause. Devlin objected to this course of proceeding, and insisted that he had the right to have the jury retire and consider of their verdict in his case before having another submitted to them. The court overruled

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the objection. Evidence was heard in the second cause, and the two causes were submitted to the same jury, upon instructions, at the same time, and they retired to consider the several causes submitted to them. They returned separate verdicts.

A. J. P. Garesché, for appellant.

C. G. Mauro, (circuit attorney,) for respondent.

I. The Criminal Court committed no error in submitting both cases to the jury at the same time. It was a matter of discretion with that court, and this court will not interfere unless it is apparent that injustice has resulted from it. Both cases were misdemeanors, and the court below, to save time and costs to the county, tried and submitted them to the same jury at the same time. No injustice was done the appellant, because the lowest punishment was imposed upon him. The evidence shows clearly that an offence had been committed by him.

RYLAND, Judge, delivered the opinion of the court.

This was a prosecution for an assault and battery. There was a trial by a jury, and a verdict against the defendant. The record shows that after the testimony in this case was closed, the court called the next case on the docket, being for a misdemeanor, against another defendant, and the testimony in this last case being also finished, the jury were then instructed as to the law in this case against Devlin. This course of proceeding was objected to by the defendant, Devlin, who insisted that his case should be first submitted to the jury and be determined before any other matter should be submitted to the same jury. In this we think the defendant was right, and for the irregularity in this matter the judgment below must be reversed. This may be looked upon as a small matter, and that the irregularity might have done injury to either party; but it is nevertheless an irregularity which this court must not allow. If we begin in this manner to sanction such a proceeding, we can not tell when or

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where it may end. It is the right of the accused to have his case tried by a jury free from any improper bias. This trial must be in its nature a single matter, and the court has no right to impose on the defendant and his counsel the necessity of waiting and listening to a different prosecution for a different offence; and has no right to draw the attention of the jury to a new and different prosecution before the first one submitted to them is determined.

This is a dangerous precedent, and it requires condemnation at once. Irregularities begin at first by degrees, and are tolerated because no perceivable injury has followed the first step. But the best method is not to sanction one so new, and which may lead to such consequences as the one here complained of. The judgment below is reversed alone on the ground of the irregularity here mentioned. The other judges concurring, the judgment will be reversed, and the cause remanded.

THE STATE, Respondent, v. McDONALD, Appellant.

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103 189

25 176
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1. In the case of an indictment for adultery, the declarations and admissions of the defendant are competent evidence to prove that he was a married man at the time of the alleged adultery.

Appeal from St. Louis Criminal Court.

This was an indictment for adultery. Upon the trial the State, to prove the marriage of the defendant, Robert McDonald, at the time of the alleged adultery, offered the declarations of defendant, made before and after the alleged adultery, to the effect that Rebecca McDonald was his wife, and that he had intermarried with her in the state of Pennsylvania. The court admitted these declarations against the objection of defendant. The court gave the following instruction to the jury: "If you believe that defendant acknowledged a woman named Rebecca McDonald to be his

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wife and lived with her as such, this is competent evidence of his marriage for your consideration ; and if from these circumstances you are satisfied beyond a reasonable doubt that defendant was lawfully married to the said Rebecca, you should find the fact of his marriage for the State." The following instructions asked by the defendant were refused : " Mere evidence of cohabitation of the defendant with Rebecca McDonald, and his holding her out to the world, is no proof of marriage ; and unless the jury have other evidence of marriage, they should acquit. In a case of this character marriage can only be proven, 1st, by persons who were present at the marriage ; or, 2d, by the certificate of marriage, or the record evidence of the same ; that in a prosecution for adultery, marriage can not be proven by the admission of the defendant." Other instructions were given and refused. It is unnecessary to set them forth.

N. McDonald, for appellant.

I. The court erred in refusing the instruction asked by defendant. Though there are some decisions to the effect that in prosecutions for bigamy, adultery, &c., the confessions of the defendant are sufficient to establish the fact of marriage, the preponderance of opinion is the other way. (See R. C. 1845, p. 730 ; Whart. C. L. 759 ; Morris v. Miller, 4 Burr. 2057 ; Birt v. Barlow, Dougl. 171 ; 1 Selw. N. P. 14 ; 3 Black. Com. 140 ; 1 Carr. & Kir. 164 ; 2 Wils. 399 ; Leader v. Barry, 1 Esp. 353 ; Commonwealth v. Littlejohn, 15 Mass. 163 ; Commonwealth v. Norcross, 9 Mass. 492 ; People v. Humphrey, 7 Johns. 314 ; Fenton v. Reed, 4 Johns. 53 ; The State v. Roswell, 6 Conn. 446 ; Kerby v. Rucker, 1 A. K. Marsh. 290 ; 15 Mass. 163 ; 7 Greenl. 57 ; 8 id. 75 ; Swift's Digest, 501 ; Arch. C. P. 475 ; Jackson v. People, 2 Scam. 231.)

H. A. Clover, for the State, cited Morgan v. The State, 11 Ala. 289 ; State v. Hilton, 3 Rich. S. C. 434 ; Mary Norwood's case, 1 East. — ; Commonwealth v. Werner, 2 Va. Cas. 95 ; State v. Britton, 4 McCord, 256 ; Commonwealth v.

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Murtagh, 1 Ashm. 272; Forney v. Hallacher, 8 S. & R. 160; 16 Ohio, 173; Cook v. The State, 11 Georg. 53.

RYLAND, Judge, delivered the opinion of the court.

This was an indictment against Robert McDonald for adultery. He appeared to the indictment and pleaded "not guilty." There was a trial, and the defendant was convicted. He moved for a new trial, which being denied, he brings the case here by appeal.

The only question for our determination is, whether defendant's confession that he was married was competent evidence. On the trial below, the State, to prove the marriage of defendant at the time of the alleged adultery, &c., offered the declarations of the defendant, made before and after the alleged adultery, to the effect that the said Rebecca was his wife, and that he had intermarried with her in the state of Pennsylvania. The defendant objected to the introduction of such evidence as incompetent to prove a marriage in fact; but the court overruled the objection, and let in the evidence. The defendant saved the point, and this is the only question in the case.

Greenleaf, in his treatise on evidence, (1 Greenl. Ev. § 215,) says: "Subject to these cautions in receiving and weighing them, it is generally agreed that *deliberate confessions of guilt* are among the most effectual proofs in the law." "Their value depends on the supposition that they are deliberate and voluntary, and on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience." In the same treatise, (2 Greenl. Ev. § 45, tit. Adultery,) it is said: "As to proof by the *confession* of the party, no difference of principle is perceived between this crime and any other. It has already been shown that a deliberate and voluntary confession of guilt is among the most weighty and effectual proofs in the law." In Cayford's case, 7 Maine, 57, it was held that in an indictment for lewd cohabitation, adultery or bigamy, the prisoner's confession of the fact of his

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marriage is sufficient proof of the fact. In this case, Mellen, C. J., said : " Nothing is more clear than that proof of the voluntary confession of a man, on trial for adultery or lascivious cohabitation, that he is guilty of the crime charged, is legal evidence, and, in the absence of controlling evidence, is abundantly sufficient ; and the reason why his confession, that he was a married man at the time of committing the offence charged, should not be good also is not very apparent." In Morris v. Miller, 4 Burrow, 2057, Lord Mansfield said that " In case of bigamy, as well as in *crim con.*, it is essential to prove marriage in fact as distinguished from the acknowledgment of the parties. The cases however are different. In the civil action the plaintiff demands damages which he has no right to recover unless there has been a legal marriage between him and the woman with whom the defendant is charged to have committed the adultery ; and in such a case the confession of the defendant, who may be a total stranger to the marriage, will amount only to an acknowledgment of a marriage by reputation. In that light the court viewed the confession of Miller as to the alleged marriage between Mr. and Mrs. Morris. But in a prosecution against a man for bigamy, adultery, or lascivious cohabitation, the confession of the defendant is of a different character. It is the confession of one who must certainly know whether the fact confessed is true or false." Justice Buller, speaking of the case of Morris v. Miller, says : " The evidence of the defendant's confession was not sufficient, for it was only a confession of the reputation that she went by the name of the plaintiff's wife, and not a confession of the marriage." " This case, instead of proving that a full and voluntary confession of the marriage was not sufficient to prove it, seems clearly to justify a different conclusion, and such a conclusion Phillips has drawn." (Buller's N. P. 28; 2 Phill. Ev. 211.) Phillips says, speaking of Morris v. Miller : " This decision does not warrant the conclusion that a distinct and full acknowledgment of the marriage, made by defendant himself, will not be evidence of the fact against him, and sufficient to dispense

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with the more formal and strict proof of marriage." In Rigg v. Curgenvan, 2 Wilson, 899, where the case of Morris v. Miller was cited, it was said by the court that, "if it were proved that defendant had seriously recognized that he knew the woman to be the plaintiff's wife, it would be evidence proper to be left to the jury without proving the marriage." East, in his Pleas of the Crown, 471, speaking of this acknowledgment by a defendant, says: "With respect to such evidence of a bare acknowledgment, it may be difficult to say that it is not evidence to go to the jury like the acknowledgment of any other matter *in pais*, where it is made by a party to his own prejudice at the time." In Regina v. Simmons, 1 Carr. & Kir. 164, it was held that the first marriage may be proved by the admissions of the prisoner in a prosecution for bigamy. In Jacob Warner v. The Commonwealth, 2 Virg. Cas. 95, the acknowledgment of the husband that he is married, and his cohabitation with the woman as his wife, are proper evidence of the first marriage in a prosecution for bigamy in Virginia. In this last case, the cases of Morris v. Miller, and Birt v. Barlow, Doug. 172, are commented on and considered not to be contrary to this doctrine. In South Carolina, on a trial for bigamy, the first marriage may be proved by the declarations of the defendant and evidence of cohabitation. (State v. Hilton, 3 Rich. 434; The State v. Britton, 4 McCord, 256.) In Alabama similar confessions are admissible. (Morgan v. State, 11 Ala. 289.) In Ohio, on an indictment for bigamy, the admissions of the defendant as to a prior marriage, may be given in evidence to prove the fact of such marriage. (16 Ohio, 173.) In this case the cases of People v. Humphrey, 7 Johns. 314, Morris v. Miller, Birt v. Barlow, State v. Roswell, 6 Conn. 446, were cited in the argument. In Georgia admissions of the defendant as to the fact of his marriage are admissible in evidence. (Cook v. State, 11 Georg. 54.) This case was decided in 1852, and many of the cases upon the same subject are reviewed. The cases from Massachusetts and New York and Connecticut are noticed by the

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court; also those from Pennsylvania. In Commonwealth v. Murtagh, 1 Ashmead, 272, the confessions of the defendant, in a prosecution for bigamy, are held to be adequate evidence of the marriage. In Forney v. Hallacher, 8 Serg. & Raw. 160, in an action of *crim. con.*, the declaration of the defendant, that he knew A. B. was married to the plaintiff and that with full knowledge of that fact he had seduced her affections and debauched her, may be given in evidence in proof of the marriage. Ch. J. Gibson said: "The question is supposed to depend on the authority of Morris v. Miller, in which it is held that proof of actual marriage was requisite in contradistinction to proof of cohabitation, reputation and other circumstances, from which a marriage might be inferred. That case, for every thing decided in it, is good authority; for nothing is more certain than that to support an action for criminal conversation there must have been an actual marriage. But it is quite another thing to say that such a marriage shall be proved only by the oath of an eyewitness to the marriage ceremony. We at once feel the good sense of the rule that excludes the mere representation of marriage which always arises from the declarations or acts of the plaintiff himself; but how a defendant's unqualified and positive acknowledgment of a marriage in fact can be excluded on any principle or rule of evidence, I am at a loss to discover."

I have not considered it necessary to comment on or to notice in this opinion the various decisions against this evidence. I have examined the cases referred to in New York, Massachusetts, Connecticut and Kentucky. Upon a full examination of the authorities, both elementary and of decided cases, we are unanimously and clearly of the opinion that such evidence is competent. The court therefore committed no error in receiving it; nor in refusing the instructions asked for by defendant in regard to it. Let the judgment be affirmed; the other judges concurring.

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McNAIR et al., Appellants, v. LOTT et al., Respondents.

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1. To extinguish or bar an equity of redemption, where lapse of time alone is relied on, twenty years must have elapsed since the last recognition of the mortgage.
 2. A demurrer should be resorted to to raise the defence of the statute of limitations, if at all, only where it clearly appears that the plaintiff's case has been fully stated, and that being so stated no recovery can be had.
 3. A., in the year 1819, to secure the repayment of a loan of money, executed an instrument in the French language in the form of a French hypothecation and containing the words, "obligé, engage, allié, affecté et hypothqué: held, that this was a mortgage within the act of October 20, 1807, concerning mortgages. (1 Terr. Laws, p. 182.)

Appeal from St. Louis Land Court.

Demurrer to a petition. Plaintiffs state in their petition substantially that in the year 1819, the late Col. Charles Dehault Delassus was the owner and proprietor of, and as such had possession of, a certain tract of twenty arpens, known as survey No. 332, in the name of Joseph Brazeau; that afterwards said Charles became indebted to Baptiste Douchouquette and Marie Therese Brazeau, in the sum of \$1000, for money loaned him, for which he agreed to pay each at the rate of ten per centum per annum until paid; and to secure the payment of one-half of said sum to each, he did on the 7th day of January, in the year 1819, execute and deliver to each of them his four several promissory notes, each for the sum of \$200, due and payable on the 20th December, in the years 1819, 1820, 1821, and 1822, with interest on each at the same rate from maturity; that he at the same time made and delivered to each a deed of conveyance, in the nature of a mortgage,* of and to said tract of land, which said deeds had conditions that in the event said Charles paid the sum

* The following is the hypothecation to Duchouquette: " Sachent tous ceux qui ces présentes verront que moi, Charles Dehault Delassus, du comté de St. Louis, Territoire du Missouri, pour prix et en considération de la somme de deux mille huit cent piastres, que je déclare bien et légitimement devoir et

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of \$2000 to each on or before the 20th of December, 1823, with interest, the said deeds were to become inoperative, and said interest notes not due were to be delivered up and canceled; that said deeds and notes were signed and sealed, and were written in the French language; were accepted and were duly recorded; that in the year 1819, by written agree-

promets de bien et duement payer à Baptiste Duchouquet, du dit comté, comme suit savoir, deux cent piastres au vingt Décembre prochain, deux autres cent piastres au vingt Décembre suivant, deux autres cent piastres au vingt Décembre encore suivant, deux autres cent piastres au vingt Décembre encore suivant, pour lesquelles sommes j'ai consenti au dit Baptiste Duchouquet mes billets en datte du jour de la datte des présentes, et enfin la somme de deux mille piastres au vingt Décembre de l'année mil huit cent vingt trois, le tout pour valeur recue; pour sureté et payement de la dite somme de deux mille huit cent piastres, j'ai engagé, allié, affecté et hypothqué, comme de fait et par ces présentes j'engage, allie, affecte et hypothque, une terre seize et située à environs un mille au sud de la ville St. Louis, sur laquelle je reside, ayant deux arpens front au Mississippi et courant vers l'ouest jusqu'au chemin qui conduit de cette ville à Carondelet, bornée au sud par Bernard Pratte, et nord par la terre concedée à Joseph Brazeaux, a présent défunt, étant la même terre que j'ai acquise de Theodore Hunt et Anne, son épouse, ainsi qu'il est constaté par acte enregistré en l'office du Recorder de ce comté, livre F pages soixante-treize et suivantes; de plus affectant, allierant, engageant et hypothquant également la juste demie ou moitié d'une terre de dix mille arpens seize et située sur une des branches de la riviere à Renau qui tombe dans la grande riviere qui perd ses eaux dans la riviere Marameck, et à environs cinquante cinq milles à l'ouest nord ouest de Ste. Genevieve, bornée du côté du nord et de l'ouest par des terres vacantes, du côté du sud par les terres des habitans de la Mine à Breton, et du côté de l'est par un branche de riviere qui perd ses eaux dans le riviere Marameck, la quelle demie ou moitié j'ai acquise de Pierre Chouteau et Brigitte, son épouse, par acte de ce jour; promettant, m'obligeant, et m'engageant de ne vendre, engager, allier ou affecter la dite propriété avant le payement final des sommes cy dessus et aux termes y expliqués sous peine de toute nullité et de tous dépens, dommages et intérêts. Il me sera cependant loisible, en tel tems que soit avant le vingt Décembre de mil huit cent vingt trois, d'obtenir mainlevée du présent hypothque en remboursant et payant au dit Baptiste Duchouquet, ou à son représentante la sus dite somme de deux mille piastres, avec intérêt à raison de dix pour cent à compter du jour du vingt Décembre précédent le dit remboursement et payement; et au jour du dit payement et remboursement le dit Baptiste Duchouquet, ou son représentant, me remettra les billets cy dessus mentionnés qui resteront à échoir. En foi de quoi j'ai signé et scellé ces présentes à St. Louis ce sept Janvier de l'année de Notre Seigneur mil huit cent dix-neuf. [Signed] Charles Dehault Delassus, [seal.]

ment made between said Baptiste and Marie, the former was vested with power to manage her estate, and at her death became absolute owner thereof; that he assumed such management during her life and at her death owned and claimed her property, including the debt due as aforesaid; that the first interest note due said Marie was paid and canceled; that the one first due said Baptiste was reduced by credits to fifty-five dollars; that afterwards the remainder of said indebtedness being due and unpaid, said Baptiste, in the name of himself and said Marie respectively, instituted proceedings in the Circuit Court of said county—one to foreclose the equity of redemption of said Charles under said deeds and sell said lands—the other by action of assumpsit to obtain judgments for said debts due each as aforesaid; that at the July term of said court, 1824, without service of process, judgments were rendered in favor of each for the sale of said land on a particular day named; also for the principal and interest due each and secured by said deeds in the actions of assumpsit; whereby each obtained judgments in two forms of proceedings in the same court, at the same time, for the same debt due each as aforesaid; upon each of which judgments executions issued in 1824, and were not executed but returned by order of plaintiffs to clerk's office. Afterwards, in 1827—said Charles then being a resident of the state of Louisiana, and said judgments unsatisfied—said Baptiste, with the knowledge of one Theodore D. Papin, his agent and son-in-law, caused a *fi. fa.* to issue against said Charles (then absent) on the judgment in assumpsit in his name, and the said tract or survey levied on, and all the right, title, estate, &c., of said Charles therein sold subject to all prior judgments and decrees; that said Papin became the purchaser at the bid of \$1050; that before and at the time of said levy, sale and purchase by Papin, said tract of land was in the actual possession, use and enjoyment of the said Baptiste in virtue of said mortgage deeds; that Papin, with full knowledge of all the above facts in regard to said judgments and land, and knowing that his said purchase was void and in-

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operative, did, on the 19th day of December, 1827, purchase of said Baptiste and Marie their right and estate in said tract of land, and received possession thereof, and a deed of conveyance thereof; that afterwards said Marie died and by the said agreement made with said Baptiste, in 1817, her interest in said judgments passed to and became vested in him; that in 1834 said Baptiste made his will, constituting said Papin and his son Baptiste Douchouquette, executors thereof, and then died; that said will was duly proved; that said Papin and Baptiste the son assumed on themselves, in due form of law, the execution thereof; that afterwards, on the 16th of December, 1836, said Charles paid to the executors the full amount of each of said judgments or debts secured by said deeds of mortgage; that as evidence thereof Papin and Douchouquette, as executors, in the vacation of said Circuit Court, in the presence of the clerk thereof, did on the minutes or record of each of said judgments enter on the margin of each an acknowledgment of "full and entire satisfaction," which acknowledgment was signed by them and attested by the clerk, whereby said Charles became released from said judgments; that from neglect or ignorance they failed to enter a like acknowledgment in the margin of the record of said deeds of mortgage in the recorder's office; that they failed to execute a deed of release of said land as required by law; that said Papin had assigned and transferred his right to the use and possession of said land, excluding said mortgage debts, to one William T. Phillips, who entered and took possession of the same with full knowledge of all the before recited facts in regard to said land; that after the payment of said judgments, in 1836, said Charles returned to his home in the state of Louisiana and there died intestate, leaving Augustus Delassus, his only child, heir and legal representative, who did not come to the knowledge of his right and claim to the land until 1848; [various deeds of conveyance are here set forth from said Augustus Delassus to plaintiffs;] and the plaintiffs charge and aver that the execution, under which said Papin purchased said land in 1827, issued on a

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judgment for the identical debt due said Duchouquette, and to secure the payment of which said deed of mortgage was executed by said Charles in 1819, and none other; that the same was in due form of law paid and satisfied in 1836—all of which was known to said defendants and each of them at the time they entered and took possession of said land; that said defendants, and each of them and those under whom they claim parts of said land, entered and took possession of the same under the right and title of the said Charles, and none other; that they now refuse to surrender possession thereof and release their claim, although requested so to do; that said defendants, and each of them, and those under whom they claim, and hold parts of said land, entered and took possession thereof as trustees by deeds of assignment from said mortgagees, Baptiste and Marie, to Papin and from him to said Phillips as aforesaid; that the sale and purchase under said execution by Papin, was a fraud on the rights of said Charles, and the deed executed by the sheriff as evidence thereof was inoperative and void; that should said sheriff's deed to Papin be considered valid and operative to pass the right of said Charles to redeem said land, then plaintiffs charge that the payment of said mortgage debts and judgments by said Charles, in 1836, did vest in him all the right of said mortgagees, Baptiste and Marie, to subject said tract of land to the payment of said debts in the possession of defendants, assignees of said Papin, as before stated; that since said land was surveyed, in 1836, there has been much accretion thereto on the river front by deposit and other causes, all of which is the property of plaintiffs, and is now claimed by defendants as assignees of said Papin; that no part of the rent of the said tract has been accounted for to the said Charles in his lifetime or since his death, to his son and legal representatives or plaintiffs; nor has the said sum of \$10,693.28 paid by said Charles, in 1836, to the executors of Douchouquette, or any part thereof, been refunded to him, his said son, or plaintiffs. Wherefore plaintiffs pray that defendants, and each of them, be compelled to surrender to

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plaintiffs said land and the accretions thereto, as now held and claimed by them, and by proper deed release all right thereto as derived from said Papin; or, that said land be subjected to the payment of said two mortgaged debts paid by said Charles, in 1836, with interest thereon, to-wit, said sum of \$10,693.28; that plaintiffs be restored to the possession and quiet enjoyment of said land and all accretions thereto, with a reasonable compensation for the rents and profits of said land, and damages, &c., and for such other and further relief, &c.

This petition was filed in the St. Louis Land Court Feb. 22, 1856. The defendants demurred to the petition, and set forth as grounds of demurrer that the petition does not state facts sufficient to show a cause of action; that there is a defect of parties plaintiff; also of parties defendant; that all the parties appearing to be interested and through whom the defendants severally claim title, are not made parties defendant; that the petition is multifarious in various respects; that it does not show that all the parties claim through a common source of title, nor does it show of what specific land either of defendants stand seized or possessed, nor who is seized, nor through whom they or either of them claim title; that plaintiffs do not show what specific relief they are entitled to, nor do they show that they are entitled to any relief; nor do they show how they claim general damages against all the defendants jointly, when it appears that each defendant is entitled in his own right; also that the prayer for judgment is incongruous and inconsistent in claiming the possession of the land or the payment of the amount of the mortgage debt.

The demurrer was sustained.

Cates and Buckner, for appellants.

I. The petition is not multifarious. All persons who have a real interest in the subject matter—title and possession of the land—are before the court.

II. The facts stated in the petition present an equitable cause of action not prejudiced by lapse of time. 1st. In

virtue of sheriff's sale and deed to Papin, no right or title passed; but, on the contrary, was void and ineoperative. (2 Burr. 969; 2 Johns. Ch. 130; 7 Dana, 66; McNair v. O'Fallon, 8 Mo. 203; Robertson v. Campbell, 8 Mo. 615; 12 Mo. 117.) 2d. The deeds of assignment from the mortgagees to Papin, and from him to Phillips, and from him to respondents, vested no right or claim, other than to hold the *naked possession* of the mortgaged land subject to the redemption of Delassus. (2 Sto. Eq. 1019-23; 2 John. Ch. 129; 14 Pick. 331; 17 Mass. 419, 289; 1 Hill on Mortg. 163; 9 Mo. 280; 4 Johns. 43.) 3d: The payment of the mortgage debts, in 1836, to the executors of Duchouquette, and satisfaction thereof entered on the records of the judgments, was notice to respondents of such payment, whereby their right to possession ceased. 4th. As no evidence of payment was entered on the margin of the record of the mortgage deeds or release executed, as required by law, the remedy of appellants is in *equity*, in order to reclaim possession, and, at the same time, quiet their title. (2 Burr. 978; 17 Mass. 419; 10 Mo. 229; 1 Terr. Laws, p. 46; R. C. 1825, p. 410, § 15; R. C. 1835, p. 340, § 18 & 22.) 5th. Until 1836, Delassus or his legal representatives had no right of *entry* or *cause of action*. Hence lapse of time has not operated to their prejudice before or since that period. 6th. As respondents, and those under whom they claim, are mere *tenants or quasi trustees*, limited and subservient to the *relation* of mortgagor and mortgagee, they are precluded from protection by lapse of time in a court of equity. 7th. Whether any title in the equity passed to Papin, or whether payment of mortgage debts was properly made to him or not, still, under all the circumstances and facts of this case, lapse of time does not operate against appellants. (See 2 B. Monr. 206; 9 Wheat. 498; 2 Hill. on Mortg. 1-12; 2 Mo. 94.)

B. A. Hill, R. M. Field, C. Gibson and Whittelsey, for respondents.

I. The statute of limitations is a complete bar to the relief sought, no disability being shown to have existed when the

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right to redeem first accrued or descended. The laches bars all claim, and may be relied upon on demurrer. (*Taylor v. Blair*, 14 Mo. 437; *Smith v. Clay*, 3 Brown Ch. 640; *Demarest v. Wyncoop*, 3 John. Ch. 129; *Kane v. Bloodgood*, 7 John. Ch. 93; *Provost v. Gratz*, 6 Wheat. 481; *Hughes v. Edwards*, 9 Wheat. 489; *Willison v. Matthews*, 3 Pet. 44; *Piatt v. Vattier*, 9 Pet. 416; *Elmendorf v. Taylor*, 10 Wheat. 168; *Miller v. McIntyre*, 6 Pet. 67; *Hunt v. Wickliffe*, 2 Pet. 212; 5 Pet. 498; *Bollinger v. Chouteau*, 20 Mo. 90; *Biddle v. Mellon*, 13 Mo. 335; *Keeton's heirs v. Keeton*, 20 Mo. 531.)

II. In order to redeem, all parties in interest must be made parties to the bill. Only a portion of those interested against the plaintiffs are made parties to the case at bar.

III. If Papin could ever have been regarded as a trustee for the plaintiffs, the purchase of the land at sheriff's sale, and entry thereunder upon the land claiming the same as his own, was an open and notorious disclaimer of the trust, and the statute commenced running from that time. (20 Mo. 530; 20 Mo. 488; id. 89.) After the conveyance in 1831 to Phillips, Papin could not in any way affect the rights of his own vendee. Having parted with all his rights to the property in 1831 to persons who in 1836, when he settled with Delassus, were holding adverse to him and Delassus, his power over the property was gone.

IV. The instrument claimed to be a mortgage is not a mortgage, but a French hypothecation, passing no estate in the land, being a mere pledge of the land to secure the debt; and being a mere lien on the land, it was lawful for the same to be sold under the judgment in assumpsit, and the sale to Papin, who at the time held no interest in the land, passed the title.

V. The claim is stale. The settlement between Delassus and Papin took place December 16, 1836. The petition in this case was filed February 2, 1856, within a few months of twenty years from date of the settlement. (See *Taylor v. Blair*, 14 Mo. 437.)

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SCOTT, Judge, delivered the opinion of the court.

In cases where the statute of limitations would be a bar to an action at law, if the remedy is pursued in chancery, equity following the law requires the same length of time, as a defence by way of limitation, that is required in the action at law. As between mortgagor and mortgagee, when time alone is relied on as a bar, twenty years is the shortest period prescribed by law as a limitation to an ejection; so the same period is adopted in equity as a defence to a bill to redeem. When other defences are set up, time may be a circumstance in support of them; but as a bar of itself, it must be for at least twenty years from the last act recognizing the relation of mortgagor and mortgagee. The period within which an action at law must be brought being prescribed by statute, if the remedy is sought in a court of chancery, the same limitation must be observed, and courts of equity will not permit a party to abandon the statutory bar, and relying on a shorter period set up as a defence to the relief sought by the bill the staleness of the demand.

The theory of this action is, that Papin was the person to receive the mortgage debt, and having received it within a period short of twenty years, the statute of limitations furnishes no defence to the relief sought by the plaintiffs. The petition states that Papin had assigned and transferred his right to the use and possession of said land, *excluding said mortgage debts*, to one Wm. T. Phillips, who entered and took possession of the same with full notice of all the before recited facts in regard to said land. This needs explanation, and it can only come by way of answer. If Phillips took with notice of the mortgage, should not the acts and conduct on his part and the part of his alienees, direct and indirect, be proved, which would show that he held adversely to it, and claimed by virtue of the sheriff's sale in 1827. So late as the time of Lord Redesdale it was thought that the defence of the statute of limitations could not be taken advantage of by a demurrer; and though the law has been since otherwise

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settled, yet it is obvious that such a mode of using the statute of limitations should only be employed, if at all, where it plainly appears that the plaintiffs' case is fully stated, and it is clear that he can not recover. The parties have framed their petition on a theory which would not admit of a defence growing out of the statute of limitations by way of a demurrer, and therefore it can not be expected that they would state by way of anticipation in their petition the facts which would repel such a defence. It is clear that a defence arising out of the statute of limitations could not be used by way of demurrer to an action at law. All distinction between actions is now abolished. Shall then the rule that prevailed in actions at law be adopted, or that which obtained in courts of equity? Or shall the distinctions between actions at law and suits in equity be kept up in order to ascertain when the defence growing out of the statute of limitations shall be a plea or demurrer? If considerations of convenience are to determine this question, there can be but little doubt that the rule at law will be preferred.

The main point relied on in support of the demurrer is, that the instrument of mortgage or that by which the lien was created was a French hypothecation, and is not within the statute of 20th October, 1807, concerning mortgages in force at the time; consequently, that there is nothing to prevent the land on which the lien was given from being sold by virtue of an execution on a general judgment for the debt secured by the hypothecation. Without stopping to inquire whether land, in the situation supposed, could be effectually sold on a general judgment for the debt secured by the lien, we will consider the proposition made in support of the demurrer. In doing this, it must be borne in mind that the statute under consideration was enacted before the introduction of the common law; that the then territory had but a few years previously been a French colony, and contained many French inhabitants speaking the language and employing the forms of instruments in evidencing their contracts which were in use among that people. Under such circumstances,

it is reasonable to suppose that the general assembly, in legislating on the subject, would have an eye to the contracts of the French as well as to those of the American population. The language of the act shows that the legislature was aware of the state of things under which it was acting. The words are, "*any person holding an instrument in writing purporting to be a mortgage,*" &c. The original words of the instrument in the clause of alienation, are "*obligé, engagé, aliené, affecté et hypothqué.*" These, under our law, would be sufficient to convey a title. The other parts of the instrument sufficiently show that an *hypothqué* was intended, which is the French word for a mortgage. A title is conveyed, and it appears from the body of the instrument that it was passed as a security for a debt. Is not that the very thing contemplated by the act? The parties designate it by a word which we in our language translate "mortgage." The language of the instrument shows that it was designed for the purpose which is intended by a mortgage under our law. There is no reason why one, who makes an instrument like that under consideration, should not have all the advantages to be derived from a formal mortgage under our law. In executing a French *hypothqué* nothing more or less was intended than what is contemplated by a mortgage. The two instruments then should receive the same favor from the law.

As this cause will be remanded, we will make a suggestion or two which may be of some service in its future progress. It does not appear whether the sum received by Papin in 1836 from Governor Delassus was the entire mortgage debt, or whether it was the balance due after deducting the sum of \$1050 made by a sale of the lot in dispute in 1827; whether Delassus, in paying the amount in 1836, supposed he was paying the balance of the debt due, considering the mortgaged lot as sold and passed away from him, or whether he paid under the belief that he was relieving all the mortgaged property from the incumbrance. We would know whether the omission to enter satisfaction on the judgments of foreclosure had its cause in the consideration that Delassus was

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only paying the balance of a debt, and that the mortgaged lot having been sold he was no longer concerned about it. Without pretending that the answers to these suggestions will be decisive of the case, we can not but think that satisfactory answers to them might throw some light upon it. Judge Ryland concurring, the judgment will be reversed, and the cause remanded; Judge Leonard absent.†



SHEPARD, Appellant, v. MARTIN & GETZENDANNER, Respondents.*

1. An affidavit in a proceeding against A. and B. under the "Act concerning landlords and tenants in the county of St. Louis," (R. C. 1845, Appendix, p. 1101,) which states a lease by plaintiff to A. and a demand of rent due of B., the person occupying the premises, is not rendered defective by reason of its not charging any privity between plaintiff and B., or by its not stating that the relations of landlord and tenant existed between the plaintiff and B. (Willi v. Peters, 11 Mo. 395, affirmed.)

Appeal from St. Louis Land Court.

The facts sufficiently appear in the opinion of the court.

S. A. Holmes, for appellant.

I. The affidavit is in strict conformity to the requirements of section 3 of the act concerning landlords and tenants in the county of St. Louis. (R. C. 1845, p. 1101; Willi v. Peters, 11 Mo. 395.) It was not necessary to allege that Martin was a sub-tenant of Getzendanner.

Knox & Kellogg, for respondents.

Ryland, Judge, delivered the opinion of the court.

This was a proceeding under the act concerning landlords and tenants in the county of St. Louis. The questions raised

† A motion for a rehearing in this cause was made by R. M. Field in behalf of defendants. The motion was overruled.

* The opinion in this case was delivered at the October term, 1856, of the Supreme Court.—[REP.]

Shepard v. Martin.

are as to the sufficiency of the affidavit, which is in the following form: "State of Missouri, county of St. Louis, ss. Elihu H. Shepard, being duly sworn, makes oath and says, that on the 17th day of March, 1846, he demised to one Solathiel Getzendanner, for a term not exceeding twenty years, a certain one story brick house situated on a lot fronting on the east side of Fourth street, in the city of St. Louis, in block No. 85 in said city, and which said lot is bounded on the west by said Fourth street, and on the south by land of said Shepard, and is the said lot heretofore leased by said Shepard of John McCausland and wife; also one foot of ground fronting on Fourth street, in said city, and immediately adjoining the former residence of said Shepard, in block No. 85, and running back eastwardly eighty feet, bounded west by said Fourth street, and south by the north wall of the residence formerly occupied by said Shepard, together with the privilege of using the north wall of said dwelling. And affiant further says that by the term of said lease and demise, the said Getzendanner was to render and pay rent for the said brick house, one foot of ground, and the use of the said wall, at the rate of two dollars per month, payable quarterly, with the privilege to said Shepard of re-entering, if said rent reserved should not be paid within thirty days after the same became due and payable. Affiant further says that the whole of said premises are situated in the Third ward of the city of St. Louis; that there is now actually due and payable to said Shepard, the landlord, the sum of forty-eight dollars for the rent of said premises up to the 17th day of June, 1854; that more than thirty days have elapsed since the same became due; that said sum has been demanded of John L. Martin, the person occupying the said premises, and that payment thereof has not been made."

Upon appeal by the defendant from the justice of the peace, before whom the proceeding was originally commenced, to the St. Louis Land Court, the defendant, Martin, at the March term, 1855, of that court, filed his motion to dismiss the case because the affidavit did not state that the relation

Evans v. Müller.

of landlord and tenant existed between the plaintiff and defendant Martin, because no privity between the parties was alleged, and because the affidavit contained no sufficient description of the premises sought to be recovered. This motion the court sustained, and dismissed the cause, which action is assigned for error here.

This case is fully within the principle of the decision made by this court in the case of Willi v. Peters, 11 Mo. 396. The judgment below must therefore be reversed, and the case remanded; the other judges concurring.

EVANS, Respondent, v. MULLER, Appellant.*

1. An affidavit in a proceeding under the "Act concerning landlords and tenants in the county of St. Louis," (R. C. 1845, Appendix, p. 1101,) which states that a certain lot was let to M., the defendant, for a term of twenty years at a certain rent; that the sum of \$695.50 is now due for the said rent; that the same has been demanded and payment has not been made, but which does not state of whom defendant leased the lot, or who was his landlord, or to whom he owed the debt due for rent, is defective; its defectiveness may be taken advantage of by a motion in arrest of judgment.

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Appeal from St. Louis Land Court.

The facts sufficiently appear in the opinion of the court.

D. C. Woods, for appellant.

Jones & Sherman, for respondent.

I. The affidavit was sufficient. Whatever defect there might have been in it was cured after verdict. (2 R. C. 1855, p. 1256, § 19.)

RYLAND, Judge, delivered the opinion of the court.

This is a suit under the landlord and tenant act of St. Louis county. The only question we shall notice is that arising on the defendant's motion to arrest the judgment be-

* The opinion in this case was delivered at the October term, 1856, of the Supreme Court.—[REP.]

Evans v. Müller.

cause the plaintiff's affidavit is insufficient. The affidavit is as follows : " State of Missouri, county of St. Louis, ss. Asa S. Jones, agent for Augustus H. Evans, being duly sworn, on his oath says that Casper Müller is the occupant of a certain lot of ground situate on the east side of Carondelet street, in a fractional block, bounded west by said Carondelet street, north by Wood street, and east by Short street, and south by Washington (now Miller) street ; said lot containing thirty feet front on the east side of Carondelet street by one hundred and twenty feet, more or less, in depth, and bounded north by property occupied by Tirmenstein, and south by McShore, being moreover in the first ward in the city and county of St. Louis ; which said lot of ground was let to said C. Müller on the first of August, 1841, for the term of twenty years, at the rate of forty-five dollars per annum, payable semi-annually ; and the sum of \$695.50 is now due for said rent ; and that the same has been demanded and payment has not yet been made. [Signed] A. S. Jones, agent for Augustus H. Evans."

This affidavit states that defendant leased the lot for twenty years, but does not show from whom he leased, or who was his landlord, or to whom he owed the debt. Must not the affidavit set forth substantially all the facts entitling the party to the relief? If it does not, when on trial all the necessary facts have been proved as appears by the bill of exceptions and judgment rendered for the plaintiff, can the judgment stand or must it be arrested? This case is not like the case of Willi v. Peters, 11 Mo. 395, or the case of Shepard v. Martin, decided at this term; for in these cases the affidavit did show substantially a good cause of action. Here is an omission which, in our opinion, is fatal. It is not a mere informal showing of a cause of action—a cause of action in itself good but defectively stated and set forth—but here is no cause set forth in favor of the plaintiff substantially good. The proof will not therefore help it or cure the omission. The judgment below ought to have been arrested and the suit dismissed. The judgment is reversed. The defect being incurable, the case is not remanded; the other judges concurring.

Draper v. Shoot.

DRAPER, Appellant, v. SHOOT *et al.*, Respondents.

1. A failure to pay a nominal consideration can not be shown to defeat a deed.
2. What will constitute an adverse possession of land under the statute of limitations must be determined by the circumstances of each case.
3. To support and establish such an adverse possession, a less weight of evidence is required where the entry is with, than where it is without, color of title.
4. The acts of ownership exercised must be visible and notorious, and of such a nature as indicate a notorious claim of property in the land.
5. In determining the question of adverse possession, the payment of taxes by the person asserting title by adverse possession is a fact that may, with other circumstances, be considered by the jury.

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Appeal from Marion Circuit Court.

This was an action in the nature of an action of ejectment to recover possession of lot No. 3, in block No. 11, in the city of Hannibal. It was commenced August 16, 1851. Plaintiff claims title under one Abram Bird. The lot in controversy is embraced in a tract of 640 acres patented to the said Bird or his legal representatives. The patent bears date December 1st, 1824. The city of Hannibal is located upon said tract of 640 acres. The defendants insist that a portion of the Bird title has enured to them. It is conceived unnecessary to set forth fully the facts upon which this enurement is claimed to rest. The defendants also rely upon the statute of limitations as a bar to the entire action. The facts, so far as they bear upon this defence, are as follows: In the years 1818 and 1819 there was a company known as the "Hannibal Company." It was composed of Moses D. Bates, Stephen Rector, Thomas C. Rector, William V. Rector, Richard Gentry and Thompson Bird. The Hannibal Company laid out the town of Hannibal. In the year 1819, Moses D. Bates, acting for said company, made a public sale of lots in the town of Hannibal. The lot in controversy was sold by said Bates to one Robert Masterson. No deed was executed and delivered to said Masterson by Bates. The consideration of the sale to him was his building upon the lot. By a

Draper v. Shoot.

deed dated April 15, 1819, four members of said company—Stephen Rector, William V. Rector, Richard Gentry and Thomas C. Rector—conveyed said lot to Masterson by the following deed of conveyance: "This indenture, made and concluded this fifteenth day of April, 1819, between Thomas C. Rector, Stephen Rector, William V. Rector, Moses D. Bates, Thompson Bird and Richard Gentry, all of the territory of Missouri, of the first part, and Robert Masterson, of the county of Pike, and territory aforesaid, of the other part, witnesseth, that the said parties of the first part, for and in consideration of the sum of one dollar (and being the first improver) to them in hand paid or secured to be paid, as hereinafter specified, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said party of the second part, his heirs and assigns forever, a certain lot or parcel of land situate, lying and being in the town of Hannibal, county of Pike, and territory of Missouri, known and distinguished on the plat of said town by lot number three, of block number eleven, as by reference to the plat of said town: to have and to hold the said lot and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns forever; provided always, nevertheless, that whereas the said party of the second part has this day made, executed and delivered to the said parties of the first part three several notes, bearing equal date with these presents, to secure the payment of the consideration aforesaid in the manner following—that is to say, one for the sum of 33½ cents, to be paid in six months, after the date thereof—one for the sum of 33½ cents, to be paid in twelve months after the date thereof, and one for the like sum, to be paid fifteen months after the date thereof: now the condition of this indenture is such, and it is understood and agreed between the parties aforesaid, that the described lot and premises shall be and is hereby mortgaged and pledged to secure the said several sums of money in the said notes respectively specified, and every and all of them; and if the the said party of the second part shall not well and truly pay

Draper v. Shoot.

or cause to be paid unto the said parties of the first part the said several sums of money in said notes specified, or any or either of them, according to the tenor and effect of the said notes respectively, then and from thenceforth this present indenture and the estate hereby conveyed or granted shall cease, determine and become absolutely null and void to all intents and purposes, and the said lot and premises, and all the estate, right, title and interest of the said party of the second part, of, in and to the same, shall be and the same is hereby assigned, transferred and relinquished to the said parties of the first part, their heirs and assigns forever, any thing before herein contained to the contrary notwithstanding. In testimony whereof, the said parties of the first part have respectively set their hands and affixed their seals the day and year first aforesaid. [Signed] Stephen Rector (seal), William V. Rector (seal), R. Gentry (seal), Thomas C. Rector (seal)."

The title of the Hannibal Company to the site of the town of Hannibal proved defective. After the date of the purchase from said company by Masterson of the lot in controversy, an undivided interest of one-eighth vested in William V. Rector, one of the parties to the above deed, by virtue of mesne conveyances from the heirs of Abram Bird. It is claimed by defendants that the interest so acquired enured to the benefit of Masterson and those claiming under him.

Masterson built a house on the lot in the year 1819. He never occupied it himself. He sold and conveyed it in the year 1822 to Vanlandingham. The evidence tended to show that persons holding under Vanlandingham occupied said house from 1822 until about the year 1832 or 1833, when the house fell or was torn down. A portion of the materials seems to have remained on the premises until a new house was built upon the lot in the year 1839 by tenants of Vanlandingham. There was also evidence tending to show that after the house was deserted some of the logs were sold by Vanlandingham. It was admitted that defendants and Vanlandingham, under whom they claim, were in possession of said lot from 1839—

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time of building the new house—down to the time of the institution of this suit. The defendants also adduced in evidence the assessor's books and tax receipts, showing that Vanlandingham had assessed the lot in controversy as his, and had paid taxes thereon to the state and county from 1823 until this suit was brought. The court, on motion of plaintiff, excluded these tax receipts, &c., from the jury.

The court gave the following instruction asked by plaintiff: "5. In order to enable defendants to succeed in their plea of 'possession for twenty years,' they must prove to the satisfaction of the jury that they and those under whom they claim their title have had possession of the lot in controversy for twenty years before the institution of this suit; and they must also believe that such possession was an actual, continued, visible, notorious, distinct and unbroken possession in the said defendants and those under whom they claim; and unless the jury believe from the evidence that such a possession did exist for twenty years before the institution of this suit, they must find as to this issue for the plaintiff Draper."

The court gave the following instruction asked by defendants: "If the jury believe that Stephen Rector, William V. Rector, Richard Gentry and Thomas C. Rector sold or gave the lot in controversy to Robert Masterson in the year 1819, and that said Masterson entered into the possession of said lot, claiming it as his own, and held possession by himself and tenants until the year 1822, and then by deed sold the said lot to Vanlandingham, and the said Vanlandingham then entered into the possession of said lot, either by himself or tenant, and that said Vanlandingham and those claiming under him have held possession of said lot adversely to the plaintiff and those under whom he claims until the institution of this suit, they will find for the defendants." The court, of its own motion, gave the following among other instructions: "4. To make good the defence of the defendants under the statute of limitations, the jury must find that the defendants, or those under whom they claim, or their tenants,

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had actual, continuous, visible possession of said lot, claiming the same adversely to the plaintiff, and those under whom he claims, for twenty years next before the commencement of this suit. This possession is not constructive ; but it must have been by occupation or cultivation, or by other acts of ownership which were visible, notorious and continuous. If these facts are found by the jury they should find a verdict for the defendants ; if not, as to this defence the plaintiff should have a verdict."

The court refused the following instructions asked by plaintiff: " 6. If the jury should believe from the evidence that defendants, and those under whom they purchased, claimed the title to the lot in controversy for a period of twenty years prior to the institution of this suit, and paid taxes on and exercised acts of ownership over the same, but that they did not either by themselves or tenants have continuous, actual, and unbroken possession of the lot for the full period of twenty years before this suit, then the jury should find for plaintiff."

The jury found for defendants.

Lamb & Lakenan and *Richmond*, for appellant.

I. The defendants failed to show an unbroken possession for twenty years. From 1832 till 1837 or 1838 there was no occupancy of the lot ; it was not enclosed—never had been ; the house was torn down ; and the possession was abandoned. Tax receipts can be no evidence of that visible and open possession required to sustain the plea of the statute of limitations. (10 Watts, 141 ; Angell on Limitations, 410, 415, 429 ; 2 Smith L. C. 491 ; 5 Cow. 219 ; 12 Johns. 367.)

E. G. Pratt, for respondents.

SCOTT, Judge, delivered the opinion of the court.

As the defendants claimed a portion of the premises in controversy by title, and relied on the statute of limitations as a complete bar to the plaintiff's action, and there being a verdict against the plaintiff on the whole case, it is obvious

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that it turned on the statute of limitations, as that was the only defence made to the entire demand. This view of the record will relieve us of the necessity of inquiring into the propriety of the instructions relative to the acts set up by the defendants and alleged by them to confer a title to a portion of the lot in dispute ; for if the statute of limitations is a bar to the entire demand, there can be no need of inquiring whether the defendants had any other defence to a portion of the lot claimed by plaintiff. The instructions given in relation to the statute of limitations were sufficiently stringent against the defendants, as courts have rarely laid down the law more strictly against those relying on the bar of the statute of limitations than was done by the court below. There has been one mis-trial, and two verdicts have passed against the plaintiff on this issue, and it would seem needless to submit the matter a fourth time to the jury.

There was evidence on which the verdict of the jury could be vindicated. Although our courts hold that an entry without color of title will enable the party in possession making it to defend himself under the statute of limitations, yet an entry with a color of title may be supported by a less weight of evidence than a bare entry by an intruder under no claim of right. The person under whom the defendants claim actually performed the condition on which the lot was to become his property. The non-payment of the nominal consideration can not be shown to defeat a deed. (*Meriam v. Harsen*, 2 Barb. Ch. 267.) The circumstance that the deed was executed only by some of the proprietors is one of no weight, as the evidence abundantly showed that as against them all the original purchasers would have been entitled to a conveyance for the lot. After Masterson had acquired a right to a title from those under whom he entered, their title failed, and a portion of them subsequently acquired a valid title to a tract on which the town was laid out, and he continued in possession in the manner stated by the witnesses, and never was disturbed by any one until Draper instituted this suit setting up title under a quit claim deed. And it is

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worthy of observation that it does not appear that Glasscock, under whom Draper claimed and who acquired title long subsequently to the entry of Masterson, ever had a conveyance for the specific lot in controversy, but claimed by a general description conveying a large tract alleged to include the premises in dispute. The town existed only on paper ; to invite settlers lots were granted on condition that they should be improved. The first title having failed, and some of the first proprietors subsequently becoming owners of a valid title, they may have been unwilling that the first *bona fide* settlers should be disturbed, or their sense of justice may have recognized the claim of Masterson.

As the statute proceeds upon the ground of the acquiescence of the owner of the land, visible and notorious acts of ownership must be exercised by the claimant, as otherwise there can be no ground for such a supposition, when the acts are clandestine or of such a character as can impress no person with the belief that they proceed from a claim of ownership. It is no easy matter to say what is an adverse possession. It is a question compounded of law and fact, and every case in which it is involved must be determined by its own circumstances. What is adverse possession is one thing in a populous country, another thing in a sparsely settled one, and still a different thing in a town or village. The law, as stated by the Supreme Court of the United States, in the case of Ewing v. Burnett, 11 Pet. 58, and other cases, seems very appropriate to the circumstances of this case—that to constitute an adverse possession there need not be a fence, building or other improvement made ; and that it suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by the statute ; that much depends upon the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it ; that it is difficult to lay down any precise rule in all cases, but that it may be safely said, that where acts of ownership have been done upon land, which from their nature indicate a

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notorious claim of property in it, and are continued sufficiently long, with the knowledge of an adverse claimant, without interruption or an adverse entry by him ; such acts are evidence of an ouster of a former owner, and an actual adverse possession against him, provided the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held ; that neither actual occupation, cultivation or residence are necessary where the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim.

We do not maintain that the payment of taxes is evidence of an ouster of the true owner ; but in a question of adverse possession, which depends on so many circumstances, such payment is a fact to be weighed by a jury in considering it. It would be an argument against one claiming to hold land, that he should for twenty years fail to pay the annual assessments upon it. If unexplained, such omission would certainly weaken the pretence that he claimed the land as his own, as such conduct is contrary to the course of men of ordinary prudence in relation to property to which they set up a claim. The payment of taxes may go to the jury with other circumstances, and this was a case in which such a fact was very appropriate for the consideration of the triers of the fact.

There was no error in permitting evidence to be received respecting the circumstances under which Masterson originally entered into the possession of the lot. There is no doubt that one who enters under an agreement to purchase can not set up the statute of limitations as a bar to an ejectment by the owner. His occupation, under such circumstances, will not be adverse to him by whose permission he entered. But if afterwards he asserts a title hostile to that under which he took possession for a sufficient length of time,

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with a knowledge of the owner, his possession will be protected by the statute. But this is no such case. Masterson did not enter under an agreement to purchase. He shows his deed, not as conferring a valid title, but as evidence that he took possession under color of title.

Judge Ryland concurring, the judgment will be affirmed ; Judge Leonard absent.

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THE STATE, Respondent, v. WORRELL, Appellant.

1. Where a petition of a defendant in a criminal prosecution for a change of venue sets forth one of the statutory grounds for such change, the order removing the cause will not be rendered null and void by reason of an omission to specify therein the cause of removal.
2. Where a motion for a continuance on the ground of the absence of a material witness is overruled, the Supreme Court will not hold it to be error if it clearly appear that the testimony of the absent witness would not have affected the result.

Appeal from Franklin Circuit Court.

It is deemed unnecessary to state the facts more fully than they are set forth in the opinion of the court.

U. Wright, for appellant.

I. The Franklin Circuit Court had no jurisdiction of the cause, the order of removal by the Warren Circuit Court being illegal and insufficient to take away the jurisdiction of the latter court.

II. The court erred in forcing defendant to trial. The causes of continuance were sufficient in law to support the motion. This court has always recognized discretion thus unsoundly exercised as error. (1 Mo. 700; 3 Mo. 28; 6 Mo. 444; 8 Mo. 500; 9 Mo. 19; 12 Mo. 492.)

III. There was a variance. If a murder be elevated to murder in the first degree because done in the perpetration of a felony, or in the attempt to perpetrate a felony, then the

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fact of the felony is a material fact essential to the crime, and on every just and established principle of pleading it should be charged. (3 Mo. 364; 20 Mo. 58; 24 Penn. 389.)

IV. The court erred in refusing the instruction asked by defendant. (Lewis C. L. 405, 431; 4 Hump. 136; Swan v. State; Mitchell v. State, 5 Yerg. 340; Dale v. State, 10 Yerg. 551; Pirtle v. State, 663; Hale v. State, 11 Hump. 154.)

V. The evidence being purely circumstantial was not legally sufficient to establish the crime charged. (Wills on Circ. Ev. 149, rule 4; Burrill on Circ. Ev. 737; 1 Stark. Ev. 511; 25 Miss. 584.)

C. G. Mauro, (circuit attorney,) and *J. D. Coalter*, for the State.

RYLAND, Judge, delivered the opinion of the court.

The defendant, Edward D. Worrell, was indicted with William H. Bruff for the murder of Bazil H. Gordon, at the May term of the Circuit Court of Warren county, A. D. 1856. The defendants were arraigned and pleaded "not guilty" to the indictment, and on their petition the venue was changed from the Circuit Court of Warren county to the Circuit Court of Franklin county—the petitioners alleging, in their application for the change, that they believed the inhabitants of the entire judicial circuit (of which Warren county composed a part) are so prejudiced against the defendants that a fair trial can not be had in the same. At the September term of the Franklin Circuit Court, A. D. 1856, the case was called and the trial was postponed to a special adjourned term of said court, to be held on the 19th day of January, A. D. 1857. At the special adjourned term of said Franklin Circuit Court, held on the 19th day of January, 1857, the parties appeared—the defendants had severed in their trials—and the defendant, Worrell, moved for a continuance of the cause; filed his own and other affidavits in support of his motion, which motion being overruled he saved the point by his bill of exceptions. A trial was then had,

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and the defendant was found guilty of murder in the first degree. He moved for a new trial, assigning among other causes that the court had improperly overruled his motion for a continuance. The court overruled the motion for a new trial; the defendant excepted, and saved the point. He also moved in arrest of judgment for the reasons that, 1st, the court had no jurisdiction of the cause; 2d, the indictment was insufficient to sustain judgment; 3d, because the judgment is for the wrong party. This motion being also overruled, he excepted and saved the point by his bill of exceptions. He thereupon prayed for an appeal to this court, which was granted, and the execution of the sentence was ordered to be stayed until the judgment of this court be had in the case.

The counsel for the prisoner relies upon the following points for a reversal of the judgment in this case. 1st. That the Franklin Circuit Court had no jurisdiction of the cause, the order of removal by the Warren Circuit Court being illegal and insufficient to take away the jurisdiction of the latter court. 2d. The court erred in overruling the application for a continuance and in forcing the defendant to trial. 3d. Variance between the murder as charged in the indictment, and the murder (if any) made out in the proof. 4th. The court erred in refusing the instruction asked by defendant. 5th. The evidence, being purely circumstantial, was not *legally* sufficient to establish the crime charged, and that this is a question for this court.

We have carefully examined the questions raised by the several points relied on by the counsel, and will state the result of our conclusions in regard thereto; not in the order as presented by the counsel and here laid down, but nevertheless we shall notice the various propositions in our own way. We begin with the first proposition, the change of venue. By our statute concerning "Practice in Criminal Cases," (art. 5,) the change of venue in such cases is regulated. It may not be improper here to cite several of the sections of this article. "Sec. 15. Whenever any indictment or prose-

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cution for a criminal offence shall be pending in any court against the judge thereof, the same shall be removed to the Circuit Court of some county in a different circuit upon the order in writing of the circuit attorney prosecuting for the circuit, or upon the order of any judge of the Supreme Court.

Sec. 16. When any indictment or criminal prosecution shall be pending in any circuit court, the same shall be removed by the order of such court, or the judge thereof, to the circuit court of some county in a different circuit, in either of the following cases: 1st, when the judge of the court in which the cause is pending is near of kin to the defendant by blood or marriage; or, 2d, where the defendant is a slave, and such judge, or a person near of kin to him, is the owner or has any interest in such slave; or, 3d, where the offence charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him; or, 4th, where the judge is in anywise interested or prejudiced, or shall have been counsel in the cause. Sec. 17.

Any criminal cause pending in any circuit court may be removed by the order of such court, or the judge thereof, to the circuit court of another county in the same circuit, whenever it shall appear in the manner hereinafter provided that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair trial can not be had therein. Sec. 18. Whenever it shall appear in the manner hereinafter provided that the inhabitants of the entire circuit are so prejudiced against the defendant that a fair trial can not be had therein, *the cause shall*,

by order of the court or judge, be removed to another circuit, in which such prejudice is not alleged to exist. Sec. 19. Such order of removal, as specified in the two preceding sections, shall be made on the application of the defendant; or where the defendant is under the age of sixteen, or is a slave, on the application of such slave, or of the owner, &c. Sec.

20. The petition of the appellant for a change of venue shall set forth the facts, and the truth of the allegations shall be supported by the affidavit of the defendant, or some credible

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disinterested person, &c. Sec. 21. Whenever it shall be within the knowledge of a court or judge that facts exist which would entitle a defendant to the removal of any criminal cause on his application, such court or judge may make an order for such removal, without any application by the party for that purpose. Sec. 22. Every order for the removal of any cause, under the foregoing provisions, shall state whether the same is made on the application of the party, or on facts within the knowledge of the court or judge, and shall specify the cause of removal, and designate the county to which the cause is removed." "Sec. 25. Every order for the removal of a cause, if made in term, shall be entered on the minutes; if made by an officer out of court, shall be in writing, and signed by such officer, and shall be filed by the clerk with the petition (if any) as a part of the record in the cause." "Sec. 31. Whenever any order shall be made for the removal of any cause, under the foregoing provisions, the clerk of the court in which the same is pending shall make out a full transcript of the record and proceedings in the cause, including the order of removal, the petition therefor (if any), and the recognizance of the defendant, and of all witnesses, and shall transmit the same, duly certified under the seal of the court, to the clerk of the court to which the removal is ordered. Sec. 32. On the receipt of such transcript by the clerk of the court to which any cause is removed, he shall file the same as a record of his court, and the same proceedings shall be had in the cause in such court in the same manner and in all respects as if the same had originated therein."

The record before us shows the following petition filed by the defendants for a change of venue:

"State of Missouri v. Edward D. Worrell and Willam H. Bruff. Indictment for murder. Warren Circuit Court—Spring term, 1856. Edward D. Worrell and William H. Bruff upon their oaths state, that they believe the inhabitants of this entire judicial circuit are so prejudiced against the defendants that a fair trial can not be had in the same;

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therefore defendants ask for a change of venue to some other circuit. [Signed] Edward D. Worrell, William H. Bruff." Subscribed and sworn to before me, this 6th day of May, 1856. [Signed] James L. Simms, Justice of the Peace."

Now under the 18th, 19th and 20th sections above recited the Circuit Court of Warren county was bound to change the venue; it had no discretion about the matter. The law pointed out the mode in which it should appear that the inhabitants of the entire judicial circuit were so prejudiced against the defendants that a fair trial could not be had therein. It was by the petition of the defendants, under their oath, setting forth the facts and the allegations. Here we see that all that was necessary under the act in regard to the petition was done. The record then shows the following entry : " State of Missouri vs. Edward D. Worrell and William H. Bruff. Indictment for murder. Now here said defendants file their petition for a change of venue in this cause, which is granted. It is therefore ordered by the court that the venue of this cause be changed to the county of Franklin in this state, and that the clerk of this county make out a full transcript of the record and proceedings in this cause, including this order, and transmit the same duly certified, together with the original papers filed and now forming a part of the record, to the clerk of the Circuit Court of said county of Franklin." The order omits to specify the cause of removal as mentioned in the 22d section. This omission the counsel for the prisoner contends is fatal; that the order changing the venue, without specifying the cause of removal, is so fatally defective as to be incapable of transferring the jurisdiction from the Circuit Court of Warren county to the Circuit Court of Franklin county, and hence the Circuit Court of Franklin county had no authority to proceed to judgment against the prisoner. We do not concur with the counsel in these views. Where the change of venue is upon the application of the party defendant himself, the cause will always appear upon the record. The petition and order of removal are parts of the record, made so by statute, and be-

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come incorporated into the record whenever filed in the court to which the removal is made ; and in all such cases there is no need to specify in the order the cause of removal. The court, in which the petition for the change of venue is filed setting forth under oath the facts which by law warrant the change, is bound to make the order removing the cause ; it has no discretion ; it can not refuse to make the order. It is the petition of the defendant stating the causes for which he prays a change of venue under the law, verified by his own affidavit, which requires the order of removal to be made by the court, and which becomes emphatically the cause of such removal. But in causes in which a change of venue is ordered and made by the court of its own motion, or by the judge of the court in vacation, or by the circuit attorney, or a judge of the Supreme Court, then the record should show by the order of removal itself the cause why it is made. There is no petition in such cases setting forth facts under oath ; nothing appears then why the order of removal should be made—why a change of venue should be directed. Hence the law required the order in such cases to specify the cause of removal. The record must show that the change of venue has been properly made ; and whenever it is made on the petition of the defendant it will, as a matter of course, show the cause of its being made ; and there can be no necessity of again specifying the cause in the order of removal. The act permits changes of venue to be made upon the knowledge of facts resting in the mind of the judge alone, to be made without the application of the defendant; nay, to be made against his will. Now, to prevent an improper exercise of this power, the court or judge, ordering a change of venue from facts cognizant to such court or judge, must specify the cause of such removal in the order making it ; for unless the cause of the order be thus specified, it may not appear. But when the petition sets forth the cause, and the order follows granting the prayer of the petitioner, there can be no reason why the cause should be again specified in the order. It is not necessary in such cases, and the statute

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will not be construed to require a useless repetition of the cause. We therefore construe the act to mean that when the court or judge makes the order of removal from the knowledge of facts in the mind of the court or judge himself, then it is necessary to set forth the cause of such change of venue in the order; but when made on the petition of the defendant himself, the cause will sufficiently appear in the petition. This court will judicially take notice that Warren county is in the third judicial circuit of this state, and that Franklin county is not. In this case then the order of change is in accordance with the law arising on the facts set forth in the petition, and the cause of such change sufficiently appears on the record. Franklin Circuit Court therefore had jurisdiction of the cause, and had the lawful authority to proceed to judgment therein. This point is therefore ruled against the prisoner.

We will next notice the point in respect to the variance between the murder as charged in the indictment and the proof given in evidence. The indictment charges that the prisoners feloniously, wilfully, deliberately, premeditatedly and of their malice aforethought did make an assault on Gordon, and that Worrell, with a pistol, did feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought, shoot Gordon in the back part of the head. The indictment is a formal and correct one under our statute for murder; that is, it charges the murder to have been done *wilfully, deliberately and premeditatedly*. It describes the wound, and avers the instrument with which the murder was perpetrated, and the manner of its perpetration. It is a good indictment for murder in the first degree. The proof was sufficient to support the charge as will hereafter be seen. But as by the proof the motive for the deed plainly appears to have been for the purpose of robbing the deceased, the counsel for the prisoner contends that as the robbery was the principal matter, and the act of killing but the incident, the indictment should have alleged that the murder was committed in the perpetration or attempt to perpetrate the robbery. Now it is

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most obvious, from the facts in proof, that the murder was the initiatory step. To take from the deceased what money and property were in his possession was the mainspring to action, and to murder him first, in order to take with more safety, was the method deliberately resolved upon. Hence the testimony shows that the deceased was shot in the head, the missile of death entering the back part of the skull and ranging front towards the right eye. Hence the remark of the prisoner Worrell "that Gordon did not suffer." "I can assure you, sir, he did not suffer." Well might he come to that conclusion. His victim was deprived of life in the twinkling of an eye, without a thought of being robbed or of any impending evil. His pockets were turned inside out. His watch, his gloves, his horse, saddle-bags, saddle and bridle were taken by the prisoner. The taking in this case was from the dead body; the murder was committed first. It was properly charged in the indictment, and the proof satisfied the jury of the prisoner's guilt. There is in fact then no variance. This point must also be ruled against the prisoner.

In order to a proper understanding of the fourth point on the part of the defence, we shall be compelled to notice the testimony on behalf of the State, and also that for the prisoner. When this is carefully examined, the remaining points, the second and the fifth, will be easily disposed of.

The testimony of Robert Walker is as follows: I knew Gordon for near twenty years; the most of that time he has been with me. I am chief engineer of the Missouri railroad. Early in January, 1856, Mr. Sturgeon and myself started along the road, and he being my assistant I directed him to accompany us; the weather was cold. I purchased a pair of gloves of the description I now use. I directed Mr. Gordon to purchase a pair like them, which he did, as I saw them on his hands on the evening of Sunday, 13th January, 1856. We left for St. Charles, Mr. Sturgeon and myself in the cars, and Mr. Gordon on horseback. We staid at St. Charles at the house of E. L. Wentze. Next morning we started—Mr.

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Pratt and Mr. Wentze and a negro boy with us. We reached Bourbonton, Wentze leaving us on his return. In passing Mexico Mr. Sherbath, another division engineer, joined us and accompanied us to Bourbonton—a daguerrean lending us a buggy—the snow at that time failing us—being in a sleigh. We had our daguerreotype taken in a group, two copies being taken by way of compensation. It was then arranged that Mr. Gordon should, on his return, get one of them and take it to Wentze's office at St. Charles. We passed along the line at the intersection of Hannibal and St. Joseph road, and returning came to Huntsville, in Randolph county, on the evening of the 20th. On Monday afternoon we left Huntsville—Mr. Gordon to go alone direct to St. Louis, and Mr. Sturgeon, myself and Mr. Pratte to go to Jefferson city. After staying at Jefferson a day or so we left for St. Louis, and reached St. Louis on the 26th. On my arrival I found to my surprise that Mr. Gordon had not then reached the city. I expected him to have on the day before. After several days, he not arriving, I became uneasy, and on the 4th of February I met McDonald and inquired if he had seen Gordon. He seemed surprised ; he told me he had not seen Mr. Gordon. I then left on next morning to go and look for Gordon, and directed McDonald to go up to where he understood Gordon had been seen, and come down to meet me, as I went up. On my arrival at St. Charles, I took Mr. Pratte along with me, and started up the Boonslick road, making inquiries, without hearing of Gordon, until at or near the place where we found afterwards the body of Gordon. We met McDonald and Wentze, and received such information as satisfied me that, if murdered, the place where he was killed was between Hutchinson's and St. Charles. We returned that night to Kenner's, and on next morning Wentze went down the road, but could hear nothing ; we then all started west to search between — and Hutchinson's. We inquired at the houses as we went along, but could hear nothing until we reached Stevenson's. He then told me that a saddle had been found. I saw the saddle at the house of Mrs. Steven-

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son, which was a dragoon service saddle, and went out to the spot where it was said it had been found, about a half mile south of the road. The thicket is a pin oak thicket, very dense, and comes up to the road from the south, becoming narrow as it came up to the road. We hunted this thicket without success, and on regaining the main road by riding up on the eastern side of the thicket, just as we entered the road, and in the hollow at the point of the thicket a negro man called my attention to some discolored snow which his dog had turned up. I left to get assistance, leaving Pratte and others to search for the body. When I returned, the body had been found, which I recognized to be the body of Bazil Gordon. The body was then lying in the hollow with face up. The snow had been removed from the face ; about thirty feet from the travelled track ; the snow which the dog had pulled up was red. Neither the gloves, the cap, nor the fur cuffs, were found on him. The overcoat was open except perhaps the two top buttons, and the pocket of his dress pulled inside out. I was shown a pin, which was said to have been found on the body, and which I recognized to be his. The body was stiff and cold. After Capt. Cozens had arrested Mr. Worrell, and had returned, he showed me a watch—this watch (producing it)—which I recognized to be Mr. Gordon's. I have no doubt of its being Mr. Gordon's. When I first got the watch, I found a paper in the watch, concealed, which has on it the name of his father and mother. I knew them to be the names of his father and mother. Before Worrell was arrested, I went to Vincennes and saw a horse in possession of Mr. Gould, a saddle and bridle, which I believe to be Mr. Gordon's. I knew the horse well ; he had a small round lump on the lower part of the jaw, just where the curb would cross it, and about the size of a walnut. While we were at Huntsville, Mr. Gordon purchased a pair of saddle-bags, and I was afterwards shown a pair in possession of Mr. Wentze which looked like the same.

Warren V. Stewart, being duly sworn, stated : He lives in Warrenton, and lived there eighteen years ; knew Gordon ;

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on the 24th day of January, 1856, in the evening, saw Mr. Gordon in Warrenton sitting on horseback near Sanders' tavern door; there was a gentleman also on horseback, about forty feet from Gordon. There was another, whom I spoke to and now know to be William Bruff; they all rode off together. I knew Gordon's horse; had attended to the shoeing him while Gordon was on his way up. (William Bruff being produced, the witness stated that he was the same man he spoke to on the occasion.) They all rode off together, the three together going down the Boonslick road towards St. Charles. I helped to take the snow off Gordon's body, about six miles east of Warrenton, in a gully at the edge of the Hickory Grove prairie. The first place west is Mrs. Stevenson's; next west, a German, whose name I do not know; and the next is Ordelheite's. The then used road ran close to the edge of the thicket. The feet of the body were lying east, and his head was twisted out of a straight line of his body, and rather tucked under; saw the body stripped. There was a large hole in the back part of the head and on a line with upper edge of the ear. I did not see whether the ball had come through the head. There was a considerable crowd about it. The wound was from a half inch to five-eighths wide. The body was discovered just before I reached the ground. There was considerable blood in the road or travelled track, from twenty-five to thirty-five feet from where the body was found. The body was found on the 6th of February. There had been several snows, at least two, from that time to the evening Gordon passed through Warrenton. The gully was eighteen to thirty inches deep. The body was entirely covered with snow. I think a person would not be likely to discover the body lying in the gully, riding along the travelled track. There was brush thrown over the body. The gully ran very near in a line parallel with the road, and a person at a considerable distance from the place on the road would be most likely to see the body in the gully. Gordon's horse was a chestnut sorrel, ball-faced horse, lengthy, and of good appearance. I think there must have fallen since the

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blood was deposited six or seven inches of snow before the body was found. I would have looked in the thicket for the body. The Boonslick road is more travelled than any other road in the state.

Henry Ordelheite's testimony. I reside in Warren, six miles east from Warrenton, on St. Charles road; was present when the body of Gordon was found. It was lying in a ditch in the old road, made by the wash of the road. We searched through the thicket. The snow about two feet deep; could discover nothing there. We examined the gully and found the body. There was three or four feet of snow over the body. Davis took a hoe to clear out the ditch, and passed over the body without discovering any thing, there being some brush sticking out of the snow, and we concluded to take out the brush, and then found the body. Mrs. Stevenson had had some wood cut close by, and the limbs left were thrown in over Gordon. There was but little snow under the body. The body lay on the back, one arm under it. The face looked as if it had been stamped by a foot, and the nose turned to one side of the face. Stewart came soon after we discovered the body. The body was about twelve or thirteen steps from the spot where the blood was found. The ditch was in some places two and a half feet wide, and others seven feet wide. The body was found about one mile east of my house, and about twenty-five feet north of the travelled track.

James Ferguson's testimony. I reside in Montgomery county, Mo., about thirteen miles east of Danville, on Boonslick road. Mr. Gordon, Mr. Worrell and Bruff were at my house. I had been boarding one of the engineers. Gordon had stopped and stayed all night with me on his way up. They rode up, and Gordon spoke to me, but did not get down while we were talking. I bought a pony of Mr. Worrell, and he rode inside the yard to receive his pay; it was a sorrel mare. I bought the mare of Worrell as he went down the road on the 24th January, 1856. I asked him where he was going. "To Clark county, Kentucky," and had been to Kansas. He stated his name was May. A man came and claim-

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ed the horse; described him so well that I gave him up. I afterwards saw Worrell in jail. He knew me. I asked him if he did not think he ought to pay me my money back; he said he did not have any money, but would make it right. I told him the man had described him so well that I was satisfied he was his horse, and gave him up. He said he would make arrangements to make it right. I asked him if he did not think he ought to pay me my money back. He then asked me if it looked reasonable he should pay me when he understood I was going to do all I could against him. I answered, "I have not said so." At the time I purchased the pony saw no symptoms of insanity; neither in jail. I took him to be a very shrewd man. He made the trade without getting off his horse; the time may have been a little more than fifteen minutes; part of this time was taken up in going into my house to get my money. I had no suspicions of insanity, and did not notice him with that view; did not speak excitedly or loud, only when he hallooed back to ask what I would give for the pony. I saw no excitement.

Wilson Hutchinson states he resides about four miles east of Warrenton, on Boonslick road; am a farmer and keep private entertainment; have lived in Warren about twenty-six years. In January, 1856, on 24th of month, Gordon, Worrell and Bruff came to my house; stopped and staid all night. The prisoners at the bar are the same men. They stopped and staid all night, and left next morning between seven and eight o'clock. They started down the road east. While there, and during the night, Worrell took out a pistol and loaded it. I saw Gordon's body after it was found, about two and a half miles east of my house. On the night Gordon and the others came to my house the ground was covered with snow, and on the morning it was snowing and very cold. When I first saw the body the snow was raked off the face, lying in the gully. When they left, Gordon went out last. The body was more than one and a half feet deep under the snow. I had passed the road many times from the time Gordon left until his body was discovered; never saw

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the body from the road ; never suspected any thing. Worrell loaded his pistol shortly after coming into the house. It was a large pistol ; the barrel seven or eight inches long. I saw Worrell in St. Louis jail about the 26th of March last ; I readily recognized him as the same man ; he also recognized me. When I went in the jail I was accompanied by two friends. Worrell was in the hall ; the two men who accompanied me went before me. So soon as he saw me he walked up, extended his hand and asked me, " How do you do, sir ?" did not speak to the other two. I then asked him if he knew me ; he replied, " Do you know me, sir ?" I told him I had seen him before. He then asked to be taken back to his cell. I went to Bruff's cell and recognized William Bruff. When I left Bruff's cell the jailor told me Mr. Worrell wanted to see me. When I went to his cell Mr. Worrell said, " You look fine and healthy." He then asked me if my family were all well. I told him my family were all well. He then said, " I suppose the roads are pretty good." I told him they were very good. I asked him, " How far did you go the day you left my house ?" He replied he went to St. Charles. I then said, " I suppose you did not call on those men you said you were going to call on—Dr. McIllheney and Dr. Watkins ?" He answered, " No." Before they started Worrell had asked me if I knew of a good house about thirty miles where they could stop. I told him Dr. McIllheney's was just thirty miles from my house, and was a good house. He then wanted to know if there was a good place half way where they could get dinner. I told them Dr. Mathews was a good place, just fifteen miles. It is thirty-six miles from my house to St. Charles. They all agreed to take dinner at Watkins', and stay all night at McIllheney's. Worrell took down the names on paper. The body lay in the gully ; his head to the west, in a sort of twisted position ; the body lay in the gully two or three hours after I came, until the coroner came ; he was then taken out ; his body laid on a wagon body turned uppermost ; he had on an overcoat and fur collar around and on his breast, and leggins. There was a

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large hole in the back of the head—a round hole, which I ran my finger in ; saw a Doctor Briscoe, a young man, run a stick in about four inches. His nose was twisted to one side. The body was covered with snow and brush ; the gully was not deep ; the way the body lay in the gully, any one going east could have seen the body, if one was looking, and there was no brush over it and no snow. I had however travelled the road several times and did not see it.

Clay Taylor states that Doctor Briscoe, jr., is now attending lectures in St. Louis at this time ; am acquainted with prisoner ; reside in Warren county, and on the 25th was on my way to Warren county from St. Louis ; on the Boonslick road met Mr. Worrell about fifteen miles east of the place where the body was found, about noon. Mr. Worrell was riding a chestnut sorrel horse, as I believe. Bruff was with him, leading a brown horse and riding one of the same. Col. White, who was with me, called my attention to Worrell's horse, and remarked, "There was a d——d fine poor man's horse." The horse was a fine looking horse. When I saw Worrell in jail on the night he was brought to St. Louis, I asked him, if he recognized me. He looked at me closely and replied, "I think I do," and dropped his head. I asked him if he would state when he had seen me. He said he was not certain whether it was at Warrenton or on the road this side. I then asked him if he recollects the circumstance of meeting three buggies together on the day of the unfortunate occurrence. He said he thought he did recollect it. Mr. Sturgeon, the president of the road, was with me, and asked Mr. Worrell, "Please state, as I am much concerned about my friend, whether he suffered or not." He replied, standing before us, "He did not suffer," and dropped his head. The answer I shall never forget. Sturgeon seemed a good deal affected. Several days afterwards I again went into jail, saw Worrell ; asked him how he was. He replied, "Tolerably well ;" seemed low spirited. I then asked him if Gordon had suffered much after he was shot ; that Mr. Gordon was a laborer of mine on road, and a friend. He replied, "I can

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assure you, sir, he did not suffer." I then left him. Soon after the body was found I marked the place ; had been searching for him. I took down the testimony for the coroner at request. I examined the body particularly ; found a hole at the bottom of the skull, behind and rather to the left. I whittled down a stick to probe the wound. Young Doctor Briscoe probed the wound, and after he was done, I probed it, and state that it was from four to five inches deep, ranging from the left side of the back part of the head to right eye ; have frequently seen gun shot wounds ; was in the campaign of 1846, in Weightman's artillery ; saw many gun-shot wounds at that time, before and since ; would think the wound from three-eighths to half inch wide, and would think was made by a cavalry pistol ; have seen gun-shot wounds made with a cavalry pistol, with a conic ball, and believe this wound was made with such a pistol.

Martin McMahon states that he saw Worrell at Christian Way's, in St. Charles city. Way keeps a tavern or boarding-house. There was another man with him, the same I saw with him at Warrenton. Mr. Bruff being produced, he stated he is the same man I saw with Worrell at Way's. They staid all night at Way's ; had three horses with them ; left next morning ; on next morning I proposed to buy one of the horses—Bruff's—a bay horse. About this time a negro came across the street, and asked Mr. Worrell if he had bought that horse, the chestnut sorrel, from Mr. Gordon. He replied, "no;" that he had brought down the horse from up the country. [Cross-examined]. Worrell and Bruff got their supper at the usual supper time. After Worrell had finished his supper he went into the kitchen and bar-room, being same room, and sat by the stove ; the kitchen is the sitting room and not the cook room. They went to bed between nine and ten o'clock ; did not sleep in same room with them ; saw them again next morning when they came to breakfast ; a quarter or a half an hour after breakfast I proposed to buy one of the horses. Worrell and Bruff were sitting on horseback watering their horses at the pump ; Bruff

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was leading one of the horses. The negro that spoke to Worrell about the horse belonged to Mr. Wentze. I am a road hand; have worked on road more than three years; the conversation was at the pump, on the street, in front of the tavern; the boarders were all gone; Way's tavern is on Main street; they left and went to the ferry-landing and crossed on the ice; was at Warrenton when Worrell and Bruff were carried up; went in obedience to a subpœna. At the time they were at Way's, they both had whiskers and mustaches; saw Worrell last September court. The horse which Wentze's negro spoke to Worrell about was a sorrel horse; the boy was the same boy who went up the line with Sturgeon, Gordon and Walker. Way's hotel was two blocks above Mrs. Eckert's.

Hartwell Richards states: I kept a tavern in St. Louis, near the corner of Broadway and Mullanphy streets. About the 26th of January, 1856, between eleven and twelve o'clock of Saturday, prisoner and William H. Bruff came to my house and put up, and left next day at the same time. He was accompanied by William Bruff. The prisoner at the bar and Mr. Bruff—who was produced in court—are the same. They went by the names of Charles Strong and John Ross—William, I think, taking the name of Charles Strong. I asked them their names, and a young man I had in the house wrote them in a book. They had three horses—one a chestnut sorrel horse, of good appearance, and had a knot under his jaw—the others were bays. They left in the morning, saying they were going across the river. Worrell was jovial and agreeable; started with some of the boarders, saying they were going to the theater; they came between eleven and twelve o'clock, the usual time of breaking up the theater. [Cross-examined.] I then kept public house on Broadway; never saw Worrell before he came to my house on 26th. I asked each man his name, and they gave them as above. There was nothing peculiar in their appearance. I held no considerable connected conversation with them; think he had two watches. I am sure he had one. He

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wore it conspicuously. Broadway, down which they started, is one of the most public streets in St. Louis. Worrell had a good deal of hair on his face; saw him in jail after he was brought back; spoke to him; recognized him, and at first he did not recognize me, but did afterwards when I called his attention, by asking him if he knew where he staid on Broadway when he went through. I would not be certain of his having more than one watch, but I think he had two; he did not seem anxious not to be seen.

S. H. Gould states: I reside in Vincennes, Indiana, one hundred and fifty miles from St. Louis; saw Worrell every day from the 2d to 6th of February; Bruff not so long; they had three horses—one a dark sorrel, one a dark bay, and the other a light bay; the sorrel horse was of fine appearance; had a lump under his jaw, about where the curb chain would touch; showed the horse to Morgan, who is here; Signer was with him; I purchased chestnut sorrel horse, saddle and bridle from Worrell; the other horses were also sold—the chestnut sorrel and a bay by Worrell, and another bay horse by Bruff; showed the saddle and bridle I bought with horse to Signer; the other horses were also sold in Vincennes; Worrell left on the train going east to Terre-Haute and Indianapolis; I have sold the chestnut sorrel horse; Worrell sold two of the horses and Bruff one; they were much jaded; the chestnut sorrel horse was bought by me for sixty-five dollars; Worrell went by the name of E. C. Worrell at Vincennes; he entered it on the register in that way; they had two saddles; the saddle I bought of Worrell was a black saddle, with raised skirts, and top of pommel the blacking rubbed off; he wore a pair of military pants, black coat, a black cap, and a pair of gloves similar to the pair now in possession of Maj. Walker; he had several rings and a watch with a common cord guard; I think he sold to my father a small prismatic white seal, hung to the watch by a strip of gold. [Cross-examined.] Myself and father were keeping public hotel in Vincennes; Worrell left at six o'clock in the evening of 6th; the day they arrived at my house was Satur-

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day, and Worrell left on Wednesday; did not conceal himself while at Vincennes; in point of fact he was a very conspicuous man; the gloves he brought to my house he traded to my father; saw him pull out his watch once; he registered his own name; Vincennes has a population of four thousand, and he went about town and made some acquaintances. I next saw him in St. Louis jail; I recognized him and he recognized me, and called me by name before I had fairly seen his face; shook hands with me; saw him but once in jail; I next saw him when I went up in company to Warrenton; Mr. Worrell told me he was going to Georgia; going east first, then around to Georgia; some time during his stay he told me this; there was a gentleman and two ladies who were detained at my house during this time; heard him say he had found an old acquaintance—a Mr. Harold—in Vincennes; my house was more patronized than any other in the city. He also had a pair of military spurs; think he had a pair of saddle-bags; he sold the horse to my father on Tuesday, saying his partner had gone off with all his money and he was compelled to sell his horse to pay his bill; he sold both horses on that day; saw nothing in his conduct peculiar or strange; seemed to be disposed to make himself agreeable to every man he met.

Isaac B. Morgan states: I was in Vincennes on the 15th February last; I went in pursuit of my horse; saw S. H. Gould; he told me had bought a horse, and to go to the stable and pick him out; saw a sorrel horse, the same I let Mr. Gordon have on the 13th January; I also found a saddle and bridle which I put on the horse when he was lent to Mr. Gordon when he went up the line of N. M. railroad; am sure the horse was mine; a chestnut sorrel horse, fifteen and a half hands high, a small star in his forehead, and some white on his nose; had a small wen on the under part of the jaw, and some white hairs on the root of his tail; the last witness is the same man who showed me the horse at Vincennes; the saddle belonged to Mr. Signer; I once rode the saddle carrying some tools carried on the pommel; the

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tools wore off the enamel blacking of leather, and I took blue ink and put on it, which left a blue spot; the bridle was Signer's, and I borrowed it; had a gag bit which I took off, my horse not going well with it, and put on an old snaffle bit; the bridle was otherwise a very fine one. Signer was with me at Vincennes, and knows the horse, saddle and bridle.

George H. Signer. I know the horse and saddle used by Gordon on January last; was a chestnut sorrel horse, and a black English tree saddle; I loaned it to Gordon to go up the road; saw the same saddle in Vincennes in possession of Mr. Gould; the same day Mr. Worrell's father came to St. Louis; I was more certain about the bridle. Saw the horse also in Mr. Gould's possession, and am confident it was the same horse Morgan lent to Gordon. [Cross-examined.] The reins of the bridle were of fine web, and a yellow brow band, with an old snaffle bit, the gag bit first used being taken off.

Erasmus E. L. Wentze states: I saw prisoner first in Dover, Delaware; saw him first 20th February, 1856; met him in the street; next morning, about two o'clock, A. M., saw him again; he came to the track of a railroad in company with Capt. Cozens, where I was standing near a hand car; we all got on the hand car—Cozens, myself, Worrell, with two others; Cozens put a pair of handcuffs on Worrell at this point; Capt. Cozens gave me a watch which I immediately recognized as the same Mr. Gordon wore; I had had it in my hands several times, and compared watches with him at my house in St. Charles; Gordon had staid at my house twelve nights at least, and I have been much with him on the line of road; Gordon was principal assistant engineer, and I was division engineer; I reported to Gordon; I told Capt. Cozens I knew it to be Gordon's watch; we left Dover on the hand car, and went—I think the name of the town was Smyrna; we stopped there in a small dépôt building to wait for the train; while there, the watch was again mentioned; I again told Cozens, in presence of Worrell, that I was still convinced it was Gordon's watch; that I knew it to be his; Worrell

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then replied, " Gentlemen, that was Mr. Gordon's watch ;" I had a pair of saddle-bags on my knee, which Capt. Cozens handed to me on coming to the hand car in Dover, and he (Worrell) further, in continuation of his last remark, said, " and those saddle-bags are also Mr. Gordon's ;" I found the paper in the watch spoken of by Maj. Walker on our journey somewhere between that place and St. Louis ; did not know it was there before ; I went with Sturgeon, Gordon, Walker and others along the line of road, to a point twelve miles above Mexico ; a negro boy accompanied us, which I had in my possession ; the party was Sturgeon, Gordon, Walker, myself, Pratte and the negro boy George ; had no other negro boy in my employment ; the boy George took care of the horses on the trip up ; the boy returned with me to Warren-ton, and when we reached there, I sent him home ahead ; the boy must have been in St. Charles on the 25th and 26th of January ; my residence was on Main street, in St. Charles ; my house stands on the north-east corner of two streets, and Christian Way's stood on south-east corner, about one hundred feet off ; Worrell, when I saw him first in Dover, had whiskers from two to four days' old ; his face had been shaved entirely clean ; the boy George was at home on the 23d day of January ; I was there and saw ; don't know that he was out of town again until about 1st February ; Gordon, on the trip up, rode a horse belonging to J. H. Morgan.

Capt. Cozens states : I reside in St. Louis ; was captain of police for a good many years ; saw Worrell first in Dover, Delaware, in a tavern ; Mr. Worrell came along with me and others to railroad depôt, in Dover ; found the watch produced (being same spoken of by witnesses) in a vest pocket hanging up in a room where Worrell was sleeping ; the watch was taken out of pocket by some gentlemen with me ; we went down to Wentze at hand car, and I took the watch from the gentleman and handed it to Wentze, who was at the car ; we got on the car and went down about twelve or more miles to a little town called Smyrna ; went into the depôt ; I asked Wentze what time it was ; he handed the watch to

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me and said, "you had better wind it up, and keep my own time;" I asked Mr. Worrell whose watch it was, and he said it belonged to Mr. Gordon; when we got near home, between Alton and St. Louis, Wentze asked to see the watch again, and opened it, and took out the paper produced; the paper had endorsed the names of William and Agnes Gordon. We laid over one day at Terre-Haute on our return, being Sunday; the watch had a chain which was hooked into a button-hole of the vest when taken from Worrell; I also found a pair of saddle-bags and trunk in Worrell's room which I brought along with me; Mr. Worrell also said the saddle-bags were Gordon's; the trunk I gave up to Mr. Worrell or his friends, every thing which is not brought; the trunk was not a very old trunk; got to Dover, I think, Thursday evening; Worrell was arrested that night, between twelve and two o'clock; did not see him before I arrested him; I went into his room with two others and took him out of bed.

The defendants gave evidence as follows:

Marcus Wright: I have resided in St. Louis for about five or six weeks to-day; knew the prisoner Worrell in Portsmouth, Ohio; became first acquainted in the summer of 1849 or 1850; he was then residing there, engaged in the employment of Wm. Eldon, a dry goods merchant; don't remember he did any thing else in particular; never knew any thing which would be considered wrong of him; I believe, so far as I know, he was well liked; was a member of a Baptist church at that place, and a teacher in a Sabbath school of that church; knew him from May until October or November of that year; I left before he did; never saw any thing of him but what was perfectly sane; seemed to conduct Sabbath school in an orderly manner; never knew of his having convulsive fits while there; I knew he was sick of a fever; do not know the character of fever; saw him while sick; saw nothing but that at times he was fretful; was quite intimate with him; don't know where he went from that place, or how long he staid there; the next Sabbath after I arrived in St. Louis, five or six weeks ago, saw him in

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the jail ; recognized him ; he also recognized me without my mentioning my name ; seemed very much pleased ; so much that he called to his father, " here is Mr. Wright ;" knew his father ; he boarded at same house in Portsmouth part of the time ; was not so much acquainted with his mother, but saw her several times, and have had conversation with her. I went to see Worrell to see if he was the same person I was acquainted with. The population of Portsmouth was at that time between three and four thousand. I think he was generally known. [Cross-examined.] I never heard him spoken of only as a fine young man ; don't think I ever saw any symptoms of insanity about him ; staid at the jail from twenty minutes to one-half an hour.

James F. McGee : I reside at present in St. Louis, and since last September ; before that time in Baltimore city ; know the prisoner ; first saw him at Vincennes last winter at railroad depôt ; next time in cars ; I stopped in Vincennes from Tuesday until Wednesday evening ; my wife in company ; was then going to Baltimore ; Mr. Worrell, understanding I was going to Baltimore, introduced himself to me ; he told me that he understood I was going to Baltimore ; he asked me whether I was going by way of Cincinnati or by Pittsburgh ; I told him I had taken ticket up by way of Crestline and Pittsburgh ; he then said he had calculated on going by way of Cincinnati ; he asked me if that was the most direct route ; I told him I judged so from their selling through tickets ; he said if that was so he would alter his course and go with me, as he was going to Baltimore ; this was in the depôt office and during the time we were waiting for evening train ; the train did not go up until the afternoon of next day ; returned to the Harrison house and staid all night ; he was dressed in a brown cloth cap, a dark over-coat, and dark colored pants ; he had also a black close frock coat ; he had a vest chain of a watch and several rings on his fingers ; he had mustache and whiskers of the goatee style, very long—unusually long. We waited at depôt on Tuesday evening until nine or ten o'clock, waiting for the evening

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train, but it not coming, returned to Harrison house and remained all night. Worrell left the dépôt before I did ; did not see him again that night ; I think he said he put up at the American hotel. The next day I again saw him at dépôt ; we waited there until the train came in from Terre-Haute ; the cars left in the evening for Indianapolis and remained there all night ; myself and wife and Mr. Worrell got into the cars and left for Indianapolis ; Worrell was dressed the same as the day before ; he told me he had been to a ball in Vincennes ; did not see Worrell at any other place than at the dépôt ; while in Vincennes he brought on the cars as baggage a pair of saddle-bags, and placed them in a seat, the same as usual with others ; Worrell put up at the same house in Indianapolis that I did—was a public house opposite the dépôt ; we started the next morning from Indianapolis ; he had on a different pair of pantaloons this morning—a pair of blue military pantaloons ; we next stopped at Crestline, in Ohio ; staid all night ; again we stopped at same hotel, and on next morning started for Pittsburgh, keeping saddle-bags in cars with him ; stopped in Pittsburgh until nine or ten o'clock at the night of same day ; at Pittsburgh, on Saturday afternoon, I remarked that as we would reach Baltimore by next stage that I would go and get shaved ; he said he believed he would do the same ; that he was getting on into the neighborhood of his friends, he thought it would make him look a little more respectable ; we went into the barbershop under the house where we were stopping, and I got shaved ; he got his mustache shaved off, leaving his goatee untouched ; after he got up I told him if I had not seen him sit down there I should not have recognized him ; the change had made him look five years younger ; he then spoke to one of the gentlemen who had been travelling with and having conversation with myself and Worrell, and the gentleman replied, " You have the advantage of me, I don't know you." Worrell told him who he was, and further stated that he had just taken off his mustache ; the man recognized him then ; we stopped at the Monongahela house ; when I told him

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about changing my apparel, we both went to the store, and I purchased two white shirts, and he one colored one; next morning we started for Baltimore by the way of Harrisburgh, as I had got tickets in St. Louis which took me by that route; married my wife in Philadelphia; we reached Baltimore on Sunday evening; I went to a private house—Mrs. Gibson's—and Worrell went to a private boarding-house—Mrs. Elsy's, on Second street, where he told me he had formerly boarded; he told me before he started there where he was going, and directed the omnibus driver to let him out there; myself and wife were in same omnibus; the omnibus stopped at the place, and he got out and requested me to call and see him that night, while I would be up town; I did not go to see him until next morning; met him on Baltimore street, in front of Brook's clothing store; was with him ten or fifteen minutes talking with him; I introduced Mr. Phelps, my companion, to him by the name of Mr. Worrell; we told him we were going to take a glass of ale, and requested him to go with us; he declined to do so; never saw him drink any on the whole trip except a glass of ale in Pittsburgh; he then had on dark pants and a dark coat, and still wore a cap, the same cap or one like it; did not see him again in Baltimore; we parted and requested me to meet him at Fountain Inn that night; this hotel is a public place, and as much patronized as any in the city; the next place I saw him was in Dover; Mr. Cozens and Harold, of Vincennes, and myself went from Baltimore by way of Chestertown to Dover; he told me that he was going to remain in Baltimore a few days; that he had some friends he was going to visit in Kent county; this was told while travelling in cars; I arrived in Baltimore on Sunday morning, and started with Cozens and Harold to Dover on Friday following; we went first to Philadelphia—Harold and myself and Capt. Mitchell, of Baltimore; left Cozens at Philadelphia and went first to Elkton, thence to Chestertown, and returned again to Elkton; while at Philadelphia I first saw Wentze, and he accompanied us from Elkton; it was the understanding that we should rejoin Cozens at Elk-

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ton, and if not at Elkton at Wilmington ; we then all went from Elkton to Wilmington, and thence to Dover ; Harold and Wentze took a private conveyance and went across the country to Dover. The first time I saw Worrell was when he was in the custody of the officers going down to the hand car ; was not present at the arrest of Worrell ; was not in house ; I thought Worrell, while I was with him, acted very strangely ; I thought so at the time, and so expressed myself ; he made himself generally conspicuous on the whole route ; would go up and speak to any person ; sit down by their side, hold conversation without introduction ; this he did with gentlemen and ladies both ; had not at this time heard any thing about the death of Gordon ; first learned at Baltimore that Worrell was pursued ; don't know where Worrell went to from Baltimore ; I parted with Worrell, Cozens and others on their return at Wilmington—myself returning to Baltimore and they going to Philadelphia ; between Smyrna and Wilmington I went into the car Worrell was in ; I told him I was very sorry to see him in custody on the charge made against him ; he said it was a pretty serious charge, but that he was going back with them quietly and thought he could clear himself of it ; I told him he should not think hard of me for being instrumental in his arrest ; that I thought it was my duty to give all the information concerning him after I had heard the report of the officers ; he replied, "no, not at all ; it was all right." Cozens was sitting by the side of Worrell at the time ; I asked him to let me have some conversation with him, and he got up and gave me his seat ; Mr. Wentze was in the same car, and I think Harold also ; Mr. Harold and myself remained at Dover the night of the arrest, and next morning took the regular train and overtook them at Smyrna, and Worrell, Cozens and the others got into the cars ; saw him no more until I came to St. Louis last September, the day before the September term of this court last ; I saw him in the jail at St. Louis ; did not see Bruff in Vincennes ; saw him first in St. Louis, at the time spoken of, in the jail ; I thought his appearance and general conduct

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strange along the road—speaking to males and females, and making himself known, telling where he was going. My wife is now in Baltimore; when Worrell commenced talking with me at Smyrna, he first said it was a pretty bad affair; I am now engaged in Summer's trunk manufactory in St. Louis; the period of my engagement expires in the spring.

Otis M. Messick states: I belong to the army, and my headquarters is Fort Leavenworth; am now in the recruiting service, and since 25th October under orders of Lieutenant Church; my grade is that of corporal; have been in the army two years next July; part of that time and last fall a year ago was out on the plains; last April was ordered to Kansas and during intervening winter was at Fort; have some slight acquaintance with Worrell; know him by sight; my company is "C," Captain Thomas J. Wood; Worrell belonged to "H" Company, Captain Newby; the prisoner was orderly sergeant of Newby's company; during the winter of 1855 and 1856, I think ten companies, comprising a full regiment, were there; saw Worrell while on the plains; knew who he was; also at the fort after our return; there are generally two companies put in same building; Company B and Company H occupied the same building, but not same rooms; Worrell, so far as I heard of him, was a man of good standing and character, or he could not hold the position he did; he deserted the fort during the winter spoken of; became corporal in April last; was at first a private; I stood sentinel a great many times during the winter spoken of; at one time while on post, and had orders to permit no one to pass without the countersign, and after the signal was given for lights to be blown out in quarters and go to bed; I had a loaded cavalry carbine and a sabre. Worrell came towards my post; I hailed him by demanding "who comes there?" he answered, "a friend;" I replied, "halt, friend;" he continued to advance on me, and said, "good evening, sentinel." I took the responsibility on myself not to shoot him, as I did not wish to do so; was not reported; it was my duty, after commanding him to halt, to fire on him; this was my orders; was not in-

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timate with him ; knew him as a sergeant of a company in same squadron ; don't think he knew me by name ; a lieutenant, a sergeant and two corporals, with the sentinels, make up the machinery of the guard ; the next morning after he had deserted, it was known he was gone ; his hat was found on the ice, and it was suggested by some that he was drowned ; don't remember that I ever messed with him ; when I first went to the fort, companies C and H were not full, and Worrell had charge of them ; never saw him under any epileptic fits ; at one time he was absent three or four days from his company, but don't know the cause. I reached the fort in September, 1855 ; the weather was cold at the time Worrell approached my post ; snow on the ground and the river frozen ; did not know Bruff. [Cross-examined.] When Worrell first left, the impression was, until he was seen, that he was drowned, as his hat was found on the ice near a hole where we had been getting water ; it is very common, where a sentinel is acquainted with another soldier, to let him pass, but I should not feel safe to approach a post unless I knew the sentinel, and that he was posted at that place.

Edward Lane states : I belong to the army of the United States ; head-quarters at Fort Leavenworth ; am a private, and now on business in the subsistence department ; joined the army twelve months prior to last August ; enlisted at Columbus, Ohio ; have been at Leavenworth, Kearney, Jefferson Barracks and back again to Leavenworth ; have been most of time at Leavenworth ; belong to first regiment of cavalry, composed of ten companies ; know the prisoner ; first saw him at Columbus in August, 1855, one or two days ; he was then in the army ; had just enlisted and was acting as non-commissioned officer ; he belonged to Company H, first cavalry, Edw. B. Newby, captain ; knew him from that time to January, 1856, when he left Fort Leavenworth ; Worrell arrived at Fort Leavenworth about the middle of August, 1855 ; I was at that time in the same service as now, acting as clerk in the subsistence department ; Worrell bore a very good character in the army so far as I ever heard ; Worrell

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did not drink enough to get intoxicated ; don't remember that he was quarrelsome any more than his duty required him to be ; he was promoted so soon as he reached Leavenworth, and his appointment dated back to the period of enlistment ; observed changes in his deportment several times ; he is a person very easy to get under excitement, and when excited, do not believe could control himself ; while under excitement he would talk a great deal, and very loud ; would use hard and very severe language ; and go to him afterwards in ten or fifteen minutes and he would be quite a different man ; he had a way considerably different from the general run run of excited men ; his eyes would roll and turn round ; the reason why he could not control himself is because I don't think any reasonable man would have acted in the way he did ; in my opinion, I have seen him perfectly deranged ; this was somewhere between the 6th November and 1st December, 1855, as I went to bed at nine o'clock ; soon after I went to bed two or three non-commissioned officers came to me and wished me to get up ; I got up and went into Worrell's room ; when I got into the room I saw Worrell lying on the bed, three or four holding him ; every once in a while he called for Lieutenant Clark, and wished him sent for ; he lay on the bed, his eyes rolling, and talked about a great many things. We sent for Lieutenant Clark and he came, and thought it was best to send for the doctor ; he came in a few minutes ; what was given to him, don't know ; remained deranged a short time afterwards, how long I can not say ; he was held because he was injuring himself, tearing the hair out of his head ; was unnaturally strong ; I assisted in holding him ; did not know me at first ; so soon as he could recognize Dr. Kyler he got better ; when I first went into room, he did not recognize any one ; the officers who came for me to go into room were sergeant Sale and sergeant Short ; the others I don't remember ; sat up all night with Worrell ; saw him deranged a short time afterwards, but paying no particular attention to it can not particularize any incidents ; he did no duty for a considerable time after these spells, and had

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nothing to excite him ; his health, for all I know to the contrary, was good ; myself and two or three soldiers and one or two citizens—the latter had been up into the quarters and were coming down the stairs—were standing at the foot of the stairs which led to the orderly's room ; a dispute arose between the citizens and soldiers, but no great noise ; we had not been there many minutes before Worrell opened the orderly sergeant's room door, with a revolver in his hand, cocked and loaded ; he swore he would shoot us ; the first I saw I was standing on the stairs ; looked up ; saw him with the revolver pointed down on us ; appeared wild and greatly excited ; we all, knowing the state of his mind, and how he would be, got out of the way as fast as we could go ; I never saw a man exhibit excitement in the same way in my life ; this last occurrence above detailed was after the time I went to his room as above spoken of ; I don't know as there was any enlargement or expansion of the eye at these times ; I have heard him say that at times he did not know what he did ; this was while we were at the fort ; my memory was better at the time I gave my deposition in regard to what Worrell told me at the fort than now ; it was then fresh in my memory ; and after my deposition was taken, I thought it was all over and would not be again called on to give evidence, and paid no more attention to it. On having had his deposition read to him, the witness further stated that he now recollects that he observed his eyes, on the occasions of his frenzies, were distended and large ; have seen him on parades, at slight and trivial circumstances, work himself into an ungovernable rage ; he would tell me, by way of apology for his rough language, that he could not help it ; he did not know what he did ; he left in early part of January, 1856 ; saw him first in this room last week ; I was sent down to be a witness for the State by order of Gen. P. F. Smith, commander of western division ; Worrell knew me when he saw me ; appeared rather pleased to see me. [Cross-examined.] Stated further that he first knew Worrell in August, 1855 ; am not a particular friend of Worrell ; was intimate with

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him, and was not unfriendly ; he drank liquor some three or four days before the occurrence at orderly's room ; he kept liquor in his room ; generally Scheidam schnapps ; and once saw whisky ; have drank with him ; he may have drank and I know nothing about it ; if he had had other liquor in his room I think I would have seen it ; I was often in his room ; did some writing there ; his trunk was open ; there was a desk in the room, and more than one trunk ; never had any business to examine his trunk, except that I have gone to his trunk and taken things out of it and put other things into it, but not often ; could not say how often ; can't swear that he had not any other liquor in his room, but did not see it ; he deserted in the early part of January, 1856 ; the occurrence at foot of stairs of orderly room was between the time of our returning from the plains in early part of November or December ; Lieutenant Clark is now living, keeping hotel in Leavenworth city, and is not now in the army ; don't remember all the persons who were in Worrell's room at the time I went into it ; don't believe it was Sunday, but would not swear positively ; when I mentioned the names of Sale and other non-commissioned officers, I alluded to and intended to be understood as saying that they were in Worrell's room ; don't pretend to say what produced the condition I found Worrell in ; don't swear any thing about it ; at the time spoken of at the foot of the stairs, I did not think it very safe to remain, as he was a very resolute man ; I thought he might shoot ; I don't say that he was deranged on parade, but his conduct was different from other orderlies. The question being asked you by C. Taylor, Richards and Morgan, "if you ever knew Worrell's being crazy," to which you replied, "I did only on one occasion ;" the witness now stated that he said so in his reply, that he saw him crazy on one occasion ; I did not wish to state publicly in that room all that I knew ; I stated to Taylor that at the time it took five or six men to hold him ; Taylor may have asked me further whether it might not have been in liquor ; I was paying no attention to it ; I might have said, I do not know ; I did not think my

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words were going to be brought in court; Worrell took off with him a heavy made bay horse, with at least one brand, and there may have been as many as three; the letter was H; it was Worrell's duty as sergeant to detail a man to assist in the stable where these horses were kept; he detailed, on the morning before he left, the man who rode the horse Worrell left with; Worrell left in the evening after this man went to the stable. The man that first was detailed for the stable and during the day was changed to the kitchen, and the man in the kitchen sent to the stable; it was the special duty of Worrell to perform this duty; the commissioned officers had only a supervisory power. A letter of Dr. Worrell, the father of the prisoner, was produced, and witness stated he received a letter from Dr. Worrell, the same, I believe, as the one produced, dated 18th June, 1856; Worrell held position as orderly sergeant in his company—the most important non-commissioned officer of company is clerk to keep the accounts of the company; was acting in that capacity at the time of leaving, and fulfilled its duties except at the time he was sick; was with Worrell on the plains, but not much to do with him. [Cross-examination resumed.] I never saw Worrell the worse for liquor but once, and never that he could not do his duty; and at the time spoken of he in evening called the roll of company and was not observed by his commanding officer; the brand "H" was put on the horse to distinguish the company he belonged to; it was put on his hoof; if there was on the shoulder a brand, it was "H, U S;" some of the horses may not have been branded; the brands on shoulders were generally two and a quarter inches long; on the fore part of shoulder; the saddle would not cover it; I was not requested to stay in room where the questions were asked me by Taylor; I went in of my own accord; this conversation was held with Taylor until after I and the others were sworn and charged by the court not to be in the court-room during examination of witnesses; I told them I would tell the truth as far as I knew it, when I came to testify; Cavendish was clerk of Worrell's

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company (H) ; H. Clark was the lieutenant of company J, I believe.

Dr. Edward H. Worrell states: He is a teacher, and, in connection with his wife, conducted a female academy, and more recently a male academy; have been a physician, and am the father of prisoner; have observed considerable departure from a sound judgment in early life in my son to an extent as to excite apprehensions for the consequence; my wife and myself have frequently talked about it; he has been subject to deliria during his whole life; this is not insanity, but near of kin to it. In 1854, near Baltimore, my son was with me and my wife visiting a friend—in the evening we were called to tea—in the summer; Edward had been to the city, and just about that time arrived; complained of being weary and tired; he declined to take tea, and sit down to refresh himself; after a while one of his aunts went out to him and came running back with great —— and stated to his mother that Edward was standing by a tree beating his head against it, and using such actions as indicated that he was crazy; myself and wife, with others, went out and we found him raving and tearing in convulsions; we took hold of him, Mr. Rose, a strong man, and myself with others; it took us all to hold him; Rose thought he was trying to get a knife and was apprehensive; saw him making indications of getting his knife, but nobody knew for what; he had a wild stare and seemed like a wild man; after a while and after a considerable struggle we succeeded in getting him down; the paroxysm was still on him; throwing his limbs about him violently, muttering to himself, but don't now remember what; it may have been muttering noise. We watched him all night, but he was not violent all night; we kept him down, and after a while he fell asleep as if exhausted—in a kind of stupor; a strong impression was made in the family in consequence; he had been to town that day as usual when he wished; was temperate; there was nothing like rum about him; did not suspect him of any thing of the kind; had no appearance of having drank any thing. He had not been with

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us all the time, as we had sent him to a Quaker's school, kept by a man who we thought would calm him down from that excitability he had exhibited before. At Cumberland, Md., while I was living there, he started with only one or two dollars to go to California; he got to Pittsburgh and wrote me he had got out of money; I sent him means and he came back; afterwards he went to Portsmouth; on one evening at Portsmouth he was brought to my boarding-house in a state very similar to what it had been at Baltimore; his fellow clerk was one of the men who brought him to my room, and he told me that Edward had taken a fit in the counting-house; Watson, the fellow clerk, seemed much scared; the only difference was he was more quiet than formerly; his mind quieted down, and seemed wandering. I then moved in 1851 to Kentucky; saw another spell at Harrison county, Ky.—the same as spoken of by Dr. Curran—in 1851; Dr. Curran and myself consulted on the subject, and were surprised; we talked at first as if he must have been a maniac, but at last concluded it was epilepsy; the weather was of about medium temperature; the doctor was at a loss to account for the attack, and asked me about it; finally concluded it was epilepsy, with more violent symptoms. In July we left Claysville and went to Winchester, Ky.; in August, 1852, I left for Dover; in the winter of 1851 and 1852, he left us at Winchester; while at Winchester we boarded at Lyle's tavern, and Edward stopt out with other young men; some young men came to me and told me he was in a very bad way; he had one of those spasms, which was not over when I got there, but was going off; complained of violent head-ache, which was the usual effect of these spasms; while going from Kentucky to Dover, Delaware, we passed through Baltimore; while there, my son stepped up and tapped me on the shoulder; he had been absent about a month; I did not at first recognize him, not expecting to see him there; that night I was sent to see my son at Mrs. Elsy's, where he was boarding; went and called on Dr. Dunbar to go with me; he went; they said he had had a fit, but then he was more

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composed, lying on the bed, disposed to sleep ; he prescribed for him valerian and columba and spirits of lavender, perhaps something else ; these are usually given in epileptic fits ; he joined the army in the fall of 1852, to my great annoyance ; did not see him again until 1855, at Wilkesbarre, Pennsylvania, the first part of that year ; I had in the mean time procured Secretary Davis to release him, and he returned home ; he practiced dentistry in office of Dr. Urkart ; we (my son and myself) left that place and reached Chicago July 19th ; we staid there one night ; during that he had no full development of epileptic fits, but was very excitable and fretful—some of the accessaries ; there was no cause which I observed to produce it ; we came to St. Louis and stopped at Mrs. Smith's—Townsley house ; I went to see Mr. Hopkins, the minister ; we staid two or three days ; my son frequently went out ; we left it and went to Louisville ; we parted at Louisville ; Edward went to Cincinnati, and, not getting into business, again joined the army ; never saw him until he came to Dover about a week before his arrest ; myself and wife then lived at Dover ; he put up at a public house in Dover ; he frequently came and took tea or dinner with us at my boarding-house ; my boarding-house is in view of the one he lived in ; we had no suspicion of any thing ; saw nothing unusual ; went about to and fro in the street ; recollects of his having on during the time pataлоons of blue color ; Samuel Ringold lived in Baltimore ; knew Blocker in Cumberland, where he was considered a very smart man ; Samuel Ringold once lived in Palmyra, Mo. ; after the arrest of my son, in a few days we followed him to St. Louis ; have seen him constantly in jail since that ; never discovered any thing more than fretfulness and excitability in him, until after September term last ; prior to that time he had had chills, and Dr. Bassett, the jail physician, gave him blue mass, but did not salivate him ; got weak and wanted fresh air, and Dr. Bassett, thinking slightly of his condition, would not give a certificate to jailor for fresh air ; don't remember of any unusual or unnatural appearances ; he had recovered from the

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chills before he had fits after September court ; the fits became very bad and alarming ; I called for Dr. Davis ; he would begin before the fits with restlessness and drowsiness and irritability—nothing going right with him—a very peculiar look in the eye—would lose his powers and faint away—his pulse remitting, and some thought was going to die ; all of a sudden he would have a most violent spasm ; after struggling, would become insensible, his eyes fixed and glazed ; would gradually revive—stare wildly—froth in mouth—suppressed respiration ; after a while would know those about him ; he generally lay down when feeling the attack coming on him ; when he would be recovering would fancy things about him which were not in reality ; these paroxysms continued up to the time of his leaving for this trial ; I prepared myself to render him assistance on the road, if there should be a recurrence of them ; but the fresh air revived him ; he would have two or three every day, or most every day ; from the first attack until we left for Union, Dr. Davis appeared as his physician ; during this time I talked to him, but he did not want to come, but afterwards got sick ; he was subpoenaed and attached in this cause, but could not attend in consequence of sickness ; Dr. Davis had no doubt of his having epilepsy ; my son occupied a cell in the upper story ; myself or wife have been with him every day since he was first taken ; she staid with him in forenoon and I in the afternoon ; he was fed part of the time by the jailor, and part by me and my wife ; I was not there generally at the ordinary dinner hour. [Cross-examined.] Stated that Robert Raisin married a cousin of my wife. Mrs. Worrell's maiden name was Ringold ; Samuel Ringold is a brother to my wife, aged about fifty-six ; James Dunn I don't know ; Blocher is not related ; neither Urghart, Curran ; got letters from my son from Leavenworth, but not so often as we thought he ought to have written ; he stated at Dover that he deserted the army ; I had heard he was dead ; Lieutenant Clark wrote to me at about that time that he was dead ; he was at home a week or ten days before he was arrested ; Dr. Bates told me

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after the arrest that he knew of my son's being charged with the murder of Gordon by publication in papers, but concluded it was a mistake. I am now astonished that he should have been able to preserve his equanimity, if guilty; saw nothing.

Elizabeth Worrell states: Her son is twenty-eight years old; was born in Wilmington, Delaware; he first showed early, when four or five years old, irritability and want of self-control—less than in children of that age; was not injured in any way in head by external violence; this irritability and lack of self-control continued to grow with age. In July, 1845, during the day he had the fit, he complained of drowsiness and excitability; after dinner his uncle Robert Tosc asked him to walk in city; I persuaded him to do so, that it might make him feel better; he went and staid till late in afternoon; I was sitting in porch when he returned; I asked him how he felt; he said he felt very bad; he sat there some time; did not seem disposed to talk, but sleepy; he was invited to tea, which he declined; we left him lying on the porch; we remained at tea table some time, and his aunt got up and said she would see if he would not take a cup of tea; she returned in a few moments frightened, and said he was beating his head against a tree; we ran out; saw him rubbing his head against the tree, foaming at the mouth and tearing his hair; I asked him what was the matter; he made no answer, but stared at me as though he did not know me; the gentlemen—Mr. Rose, Waterman and Mr. Worrell—took hold of him; I tried to pacify him; by the time they got him into the house, my sister had a bed put down on parlor floor; I saw him put his hands into his pocket, where he had a large knife; I begged Mr. Rose to get it from him, as he might injure himself; they finally got him on the bed; he struggled and tried to get up; did get up and got to the window and tried to get out; we got him back to bed; his eyes stared wildly about, gritting his teeth, and muttering; after a little while he seemed more composed, and I asked him if he knew me; he made no answer, and did not seem to recognize me;

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got some sleep before he recognized any one ; he fell asleep finally late in night, and we left him with his uncle, Mr. Rose ; next morning, about eleven o'clock, got up and walked about as usual ; seemed weak ; after this he would sometimes seem in very good spirits, and at others very much depressed, without any cause observable. The year we were in Ohio, in 1850, one evening he was brought home by Watson and others ; he seemed to be affected as he had been previously in Baltimore ; we got him to bed ; he slept and was talking wildly in his sleep ; he got up early in the morning and insisted upon going to the store ; in an hour or two afterwards, went to the store in which he was doing business as clerk ; there was no difference between the attack in Baltimore and Portsmouth, as far as I saw. At Claysville, Kentucky, on the day in which he had a fit, which was at night, he was more excited than I had ever seen him, without any observable cause ; when he was excited before, I had but to speak to him and lay my hand on his shoulder to quiet him ; but when I went to him during this day several times and asked him what was the matter, his eyes looked wild ; was excited, and walked quick ; he replied, "I don't know, mother, but I feel very bad ;" he seemed to get more restless towards night, and, earlier than usual, he said he would go to bed ; went across the street to Dr. Curran's room, where he slept ; heard nothing until eight or nine o'clock at night ; he sent over for his father, saying he was very sick ; his father went immediately ; in a few minutes they ran over to tell me he was dying ; I went over and found him in a violent fit—several trying to hold him ; the fit was more violent than the first at B. and longer ; foaming very much at the mouth ; it passed off as the previous ones had done, only he did not recover quite as soon as the others ; he was in bed all next day ; seemed desponding and shed tears at times for several weeks afterwards ; often said he wished he could die ; that he felt so wretched he did not wish to live ; he was tired of life. At Winchester, Kentucky, did not see the fit he had there ; I was aware of it when it occurred, but my son being

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in a different part of town, and with other young men, I waited until my husband returned before I would determine whether I would go ; saw him next morning, but was more himself than at Claysville, and recovered sooner. The next was in Baltimore ; I was not there at the time and did not see ; in about a week afterwards saw him ; he came to where I was near Chestertown, on eastern shore, at Wm. Worrell's, his uncle ; he was more depressed than I ever saw, even more than at Claysville ; he would sit without any expression of the eye, say nothing, and notice nothing around him, and sometimes ramble off ; he left me soon afterwards—several weeks—and went to Baltimore ; he did not tell me when he left that he was going to enlist in the army ; did not see him again until he left the army and returned to Wilkesbarre, where I was, in 1855 ; he seemed to be not so irritable at first, but towards the last grew more so ; he remained with us from January, 1855, to July, 1855, early part of the month ; I noticed two or three weeks before he left that it was with difficulty he could control himself. On one occasion I was talking with him on some subject and he became excited, and remarked he would not be controlled by any one, being such language as he never used towards me before ; his eyes looked wild ; talked loud and seemed nervous ; that he could not hold himself still ; this was a week or two before he left ; don't recollect the precise time ; he left with his father coming west ; saw him no more until he returned to Dover ; he seemed to try to control himself, and would fall on his knees and pray the Lord to help him to control himself ; this was at Wilkesbarre ; I saw it also in St. Louis a great many times ; he would often throw his arms around my neck and ask me to forgive him, that he could not control himself ; that he would rather die than give me so much trouble. Edward arrived in St. Louis on Monday and I got there on next Sunday, leaving Dover exactly one week from the time he left ; I visited him every morning after nine o'clock, and left at 12, 11 $\frac{1}{2}$ and some times one o'clock ; his father was with him in evening ; his paroxysms returned on

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him in September, after the last court ; he had a great many paroxysms while his father was absent ; he was absent four weeks ; they would come on, preceded with great irritability, but the symptoms were not always the same, as I could perceive ; I have seen him have a great many paroxysms ; he would fall into insensibility and violent convulsions ; throw his hands against the wall ; look at the wall as if he saw something on it, and strike at it ; tear his hair and grit his teeth, and frequently would not become calm until I would give him the medicine prescribed by Dr. Davis, which I could not do until I could get his teeth ; it was an anodyne ; sometimes he would lay as if he could not close his eyes, but composed ; at other times, would seem to be stupid ; and when I did not administer the anodyne, which I sometimes omitted, he would talk—call over the roll of soldiers—call a Lieutenant Clark, and ask if his horse was ready for him to go to Leavenworth city. On one occasion, quite early in the morning, he was standing with his back to the door fanning the bed with a fan ; he was not so well on evening before, and this morning I went rather earlier ; he said nothing until I put my arm around him and asked him, “son, what is the matter ?” he replied, “hush, mother, father is asleep on the bed ;” I tried to compose him and try to get him to sit down ; he did not appear to have been in bed that night from the appearance of the cell ; he always made his own coffee, and I found he had put on his teakettle, but had not lighted the lamp used to heat the water ; some of his friends came to see him that morning, but he did not recognize them ; did not come to himself until the middle of the day ; staid all day with him ; I left him much better ; at dinner time I was making a cup of coffee for him with my back to him ; heard him light a match ; I turned round and saw him put his finger on the burning match until several blisters were burned on him ; showed no sensibility to the pain ; this was while his father was absent from the city, east. I asked Mr. Music to go up and see him before closing the jail ; Music is the turnkey ; and went for Dr. Davis to go and see him ; before this

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Dr. Davis had been called in as physician; on this occasion he had no violent convulsions—at least none after I got there—no frothing of the mouth—no clenching his teeth or tearing his hair; gave him nothing that day, as the symptoms seemed to be different; I was afraid, without consulting the doctor; during the period of having these fits he has moments of cheerfulness and depression, without any cause apparent to account for the change; the changes were generally sudden. I saw I think the day before yesterday that he was going to have a fit; he spoke to me, and when I did not answer him immediately, he became very much excited; he spoke excited up in this room to me; there was no paroxysm for a whole week before he left St. Louis to come up to this court; he has had no paroxysm even until now; I know I must have witnessed one hundred of these fits in St. Louis jail—not all violent—some very slight. Dr. Davis was at jail twice after my husband left for the east, and during his absence we generally let him know of any change of symptoms; Dr. Davis had prescribed for him before this, and was to be advised of any change of symptoms; that he could not get in readily, and has much office practice. On one occasion his paroxysms were so violent that I had to get the under turnkey to assist me in holding him; his name was Mike something; never called in any one to see these convulsive fits; but others have seen—the Rev. Mr. Loup for one; never called up the jailor—Music—at any time. My son came last to Dover in January, 1856, on Wednesday night, and left the Thursday morning week; saw him every day in Dover—sometimes at our seminary, and sometimes at our boarding-house; oftener at my boarding-house; he boarded at Steamboat hotel, kept by Mr. Mullen; he was at a musical soirée while he was in Dover; had none of these fits just spoken of while there; showed no depression until the night before he learned he was to be arrested; sat down and held his head down and not disposed to talk; he came to bid us good night as usual; did not before this exhibit any anxiety, restlessness or disquietude; bid us good night; I think it must have

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been eleven o'clock at night; he had been out visiting and staid rather longer; he was acquainted with some of the lawyers of that place; don't know that he had seen any of them that evening; it was a very short distance between our boarding-houses; he never was there before; he knew all the gentlemen at house where he boarded; there was a good many there; he has an uncle living near Chestertown; also Raisin, a cozen of mine, and Samuel Ringold, an uncle, in Baltimore; generally wore the coat he has on now; he also had a pair of military pants; a pair of blue color, and another of plaid color. [Cross-examined.] Dr. Davis visited Edward not more than six times; other ladies saw him; two ladies saw him very often and in these fits; I would rather not mention their names, as it would be disagreeable to them; at the time I speak of his fanning the bed, his state of insensibility was longer; he had no symptoms of fits or convulsions before his return from last court; when he was young and showed irritability I would punish him, and at times this would seem to increase his irritability and enrage him more, and my friends would say I was too strict; I would then relax the discipline; he would always think his friends did not like him, when they would exhibit the greatest fondness for him; he had many friends amongst his playmates; the officer in charge of him day before yesterday, when he exhibited irritability, I do not remember; he may not have heard what was said.

Dr. W. W. Bassett, called by the State, states: I am a practitioner of medicine; resided for last two years in St. Louis, and before that in Manchester, St. Louis county, for fourteen years; have practiced twenty-one years; have done all the county practice for two years since last October until about two months ago; after that time only in part; it is my duty to attend the sick in jail when informed of a case; the county and state are responsible for my fees, and collected precisely as other costs; I have attended Worrell and given him prescriptions; some five or six months since, more or less, I think before the Warren

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Circuit Court, when he was indicted, he appeared to be laboring under a masked form of intermittent fever; complaining of a severe head-ache and some fever; saw nothing like derangement of the mind; noticed no symptoms of insanity; I asked him about his feelings; he answered me readily, promptly and satisfactorily, as much so as usual with patients; I was attending him more or less for two or perhaps three weeks; I mean by a masked form of intermittent fever, where the fever came on periodically and without a chill; he said his head was aching very much; this form of intermittent fever is as common as the chills and fever; the fever did not rise ordinarily to a great height; his father was with him generally; either Mr. Phelps, the jailor, or his father got me to go and see him; I gave him a combination of sulphuric ether and perhaps chloroform, bathing the head; I was not told by any of his having had epileptic fits before that; I had nothing to suppose there was irritation in the brain from any other cause than ordinary chills and fever; in ninety-nine cases out of a hundred there will be pain in the head from chills and fever; the fever intermitted every twenty-four hours; never saw his mother with him in the cell; saw him from six to ten times as a physician; have not visited him since last September term of this court; have seen him since; I was passing the door of his cell; he spoke to me; shook hands with him several times; his cell was on third story of jail; the causes of insanity are various; epileptic fits may be one of the causes of insanity; I don't know it to be; I mean, among other causes of insanity epilepsy is said to be one; I never saw any such case however; there are various forms of insanity from various causes; the kind of insanity produced by epilepsy is said to be imbecility, by which the mental faculties are very much impaired—so say the authors; I mean by imbecility a deterioration of the mental faculties from their original strength; epilepsy will weaken or impair the intellectual faculties; have repeatedly treated cases of epilepsy, both of long and short standing; in the cases I have seen there was no material change in their mental faculties

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after paroxysm was over, at least in those where I knew the patient before he was attacked ; epilepsy is sometimes caused by a stroke on the head ; sometimes by grief, fear, joy, and fright, and all the passions ; some say epilepsy, on post mortem examination, leaves traces on the substance of the brain, and some say not ; epileptic patients, after paroxysm, if they complain at all, complain of pain in the head ; never attended patients in a lunatic asylum. Pennell, Pritchard, Ray, are some of the works I have examined on the subject of insanity. The subject is not within the range of my ordinary practice, and I do not profess to be posted up ; it is very difficult often to determine whether a man is sane or insane ; I know of no physical symptoms peculiar to insanity ; some persons are perfectly sane on all subjects save one, and unless you touch upon that you may not find it out ; it would be difficult for me to determine in a case of simulated insanity, or where they make an effort to conceal it. I know of cases reported where patients in lunatic asylums have succeeded in getting out by their artful concealment ; insanity is where the person is affected with such an aberration of mind as to induce a change of action from that usual in his normal state, where there is no other known cause or motive for the change.

Dr. Bannister states : Am a physician ; reside in St. Louis ; am physician of the city hospital ; open to all diseases ; have some few lunatics ; I have had a limited opportunity of observing lunatics ; was one year at lunatic hospital in Philadelphia ; averaged about one hundred and eighty insane during the year ; never saw insanity in the form of wild delirium result from epilepsy — always imbecility ; epilepsy, from long continuance, impairs the mind and results in imbecility ; in the cases I have seen there is a gradual loss of memory, and powers of reason ; the mind becomes weak and sinks into imbecility ; it is often congenital, arising from mal-formation of the brain ; an idiot is generally known by a want of expression of the eye, the form of the head, and is unable to speak ; an imbecile would be readily found out in a few days' company ; a man afflicted with imbecility, result-

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ing from epilepsy, could not hold any position requiring the exercise of mind, without being detected by those in habit of being with him ; I have never seen a case of imbecility resulting from epilepsy under five years ; the case I saw produced by epilepsy in five years, the fit returning every other day ; I have known of two persons who have had epileptic fits at intervals from early childhood to twenty-five years, of once a month, and never exhibited any indications of loss of mind ; I have never known a case of idiocy result from epilepsy except where there was congenital malformation ; the length of time for epilepsy to injuriously affect the mind of a person depends on the violence of the attack as well as upon the strength of the person affected and power of resistance ; it would be unsafe to say that epilepsy would produce imbecility at the same time in two persons ; the first attack of epilepsy might be mistaken for some other disease, but a series of attacks ; never knew epilepsy complicated with irresistible and insane impulse ; this species of insanity is recognized to exist by the learned, and called homicidal mania ; never knew an epileptic commit suicide ; don't recollect to have seen a case of the kind ; don't remember to have seen in the books a case of homicidal mania resulting from epilepsy ; have read Tweedy's Cyclopaedia of Medicine—Taylor, Beek, Ray, Esqurol—not Mark, nor Wharton & Little ; part of the hospital was set apart for lunatics and paupers ; attended this hospital as physician ; there were five other physicians ; there was another lunatic asylum in Philadelphia exclusively dedicated to the insane ; don't think epilepsy would be more apt to produce homicidal mania in an excitable temperament ; in homicidal mania, beside the want of power over the will, there is also an uncontrollable disposition to attack those most dear to them formerly, and it involves an entire perversion of moral feelings ; insanity is often very difficult to determine ; it can be detected from the actions of the person affected ; utter imbecility or raving mania are the forms of insanity most frequently simulated ; never saw a case of feigned monomania or insanity in other forms, but

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have read of the latter in the books ; have seen insane exercise much scheming ingenuity to their keepers to convince them of their sanity ; the power to reason is not incompatible with monomania ; in homicidal insanity the patients seem to labor under great distressing thought—a great desire to do something—a sense of responsibility, and will seem to be relieved by committing the act charged against them ; he thinks it a duty to kill, and feels no consciousness of wrong—thinks he has done right ; it presents many peculiarities of this kind ; don't recollect of seeing anywhere that they ever fly to avoid the act, or conceal themselves ; they are apt to do the deed at first favorable occasion which presents itself ; in homicidal mania, or in monomania, it is often a very difficult question to determine whether such forms of insanity exist in a particular case ; there are tests made in the books to detect it ; in homicidal insanity the question whether he had the power at the time of controlling his impulse, is a difficult question ; the difficulty of determining is also because the homicidal impulse has a great resemblance to crime ; thinks there is hallucination in homicidal mania sometimes ; also in monomania. In imbecility there is neither delusion or hallucination.

Beverly H. Robinson : I am an officer in the United States army ; first lieutenant ; now stationed at Richmond, Va. ; saw Worrell at Fort Leavenworth, in April, 1854 ; I was then stationed there, and until the first July, 1854 ; I then crossed the plains as far as Fort Union, in New Mexico, with him ; have never seen him since ; we arrived at Fort Union the last of August ; was on duty with him at Fort Leavenworth ; I was officer of the day and the defendant corporal of the guard ; saw no symptom of derangement or insanity, or derangement of the mind of any kind ; did not know or hear of his having any epileptic fits during the time ; the duty of the orderly sergeant of a company is to keep the books of the company, make out all the details, call the roll, and is the most important office in the company ; it is not possible for an insane man to do the duties of the office. [Cross-examined.] I now

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remember that on my return from Harney's expedition, in December, 1855, I saw him at Leavenworth ; was first sergeant of Company H, first cavalry ; I spoke to him and told him I was glad he occupied so important an office in the company ; a man who was suspected of any insanity would not be suffered to hold the position he held ; the guard is changed every twenty-four hours ; there were eight or ten officers who took their turns every day ; I should think he would come on duty as corporal of guard every fourth or sixth day ; we were travelling near two months from Leavenworth to Fort Union ; there were two companies of dragoons and three or four hundred employees ; I belonged to Company D, second dragoons ; I was not on duty on the route ; was a mere traveller to join my company at Fort Union ; I returned in about two weeks from Union ; don't think I saw Worrell while there ; I was not in such position then that if he had been sick it would be reported to me ; there were three companies at Leavenworth from April to July—one of them artillery and two dragoons ; saw him on my return but once, and for a short time ; had but one interview with him, as above detailed ; never heard any thing about his character, independent of that of a soldier ; a person afflicted with epileptic fits would not likely be retained in office he held ; would not be enlisted if it was known ; don't know how long he remained at Fort Union ; I was messing with the captain of his company while crossing the plains, and it is probable I would have heard of his sickness if he had any.

Charles F. Clark : Resided at Fort Leavenworth ; am quarter-master sergeant since May, 1855 ; joined the army in January, 1848 ; know Worrell, first in August, 1855, until 6th or 7th January, 1856 ; he deserted the evening of January 7th—also sergeant Bruff, of another company ; two horses were taken at same time ; I know that the horse he was riding before was left ; he took another fine horse, noted for his appearance ; the horse he was in the habit of riding was in poor condition ; my duties were to assist the regimental quarter-master ; soon after he joined my company he was

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made first sergeant; saw him nearly every day when he was on duty; he would be off duty when sick and with leave; would occasionally see him several times a day; had many more official duties with Worrell than any other soldier in the garrison; during the time we received a large amount of military stores, which I assisted to distribute to the companies; Worrell received for his company; never saw him insane; we both left the Fort for Kearney, and from there to Cotton Wood Springs and back to Kearney; we started in September and got back to Leavenworth about 4th November—leaving Worrell at Muddy creek—three days' march from Leavenworth; saw him nearly every day; never during all the time saw Worrell insane; saw him once in liquor between November 6th, 1855, and January 6th, 1856; he was riding horseback, and could not sit in the saddle; kept liquor in his room—at least, have found liquor there several times; there is no regulation in the army against keeping liquor—at least, except in case of drunkenness; Bruff was of Company J, first cavalry, and Worrell and myself of H, of same regiment; it is according to the orders he received whether the sentinel allows any one to pass his post; a soldier of one regiment will allow always another of same regiment to pass his post, if satisfied of his good intentions; Worrell bore a fair character; was the best first sergeant in regiment; this continued till the day he left; an insane man could not have filled his office—the duties were very complicated. [Cross-examined.] Have no reason to doubt his honesty; I have no means of knowing whether he delivered over the arms and stores received; saw him sick once after his return from the plains; was not on any occasion called up to go to his room; never saw him present a loaded pistol at any one to shoot him since I have been in the regiment; I have been out when at Leavenworth frequently every night, and never stopped except when drunk; when I saw him drunk he was with another man, who was also reeling about drunk; I went to Leavenworth in 1855, in June; when I was at Worrell's room we drank together—the liquor was

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whisky ; never drank any brandy in his room ; it was in the afternoon that I saw him drunk, about half hour before sunset ; it was after stable call to summon the men to the stable to water and to attend to their horses ; he came from direction of Leavenworth city, and rode to the rear of the stables ; don't know how many times he was sick while we were together at the fort ; never saw him but once ; I heard he was sick at other times ; did not stay but a few minutes ; am not certain whether any one was with him ; was lying down ; looked thin and pale as any other sick man ; I was only mustered once in two months.

In vain have we looked through this long detail of evidence for the basis to support the instruction here asked for by the defendant's counsel, which is as follows : " In determining the question whether the defendant was guilty of murder in the first degree, partial insanity, if it appear in evidence, may be properly considered by the jury in determining what was the mental condition of defendant at the time of the homicide ; if the jury do not find from the evidence that the defendant was so insane as to be incapable of guilt, as explained in a previous instruction, yet if they shall believe from the evidence that, from previous epileptic fits or other cause, his mind was impaired and clouded, and incapable of deliberately, sedately, forming a fixed and settled specific design to take the life of Gordon, they ought to find him guilty of murder in the second degree." Instructions are given by the court to the jury to assist them in coming to a proper conclusion in their deliberations. The court, retaining a knowledge of the testimony as given, instructs the jury as to the law arising on the facts supposed to be in proof. The court is never required to give abstract propositions of law to the jury. The instructions must have reference to the case. There is nothing preserved in the evidence that could in the slightest degree justify the expectation on the part of the defendant's counsel that this instruction would be given to the jury. There was nothing to warrant it, and the court very properly refused it. In looking over the charge given by the

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court to the jury, we feel it our duty to express our dissent from some of the propositions therein laid down in regard to the case in proof before the court. This murder, as made out by the evidence, is most manifestly murder in the first degree. The victim in this case was most foully murdered. There can be no doubt but that he was deliberately shot by one of his companions for what he was supposed to have in his possession. He was shot from behind ; was shot in a very short time after commencing the journey in the morning—indicative of the previously formed determination—no doubt, that the idea passed through the mind of the murderer when he loaded his pistol the night before. From the wound on the body—the property taken by the prisoner, even to the gloves—the prisoner's expression, “that the deceased did not suffer”—the whole mass of circumstances leaves no doubt of the deed being done wilfully, deliberately and premeditatedly. Then if Worrell did the deed, he was guilty of murder in the first degree. Now what excuse is offered ? Nothing that would justify a court in calling the attention of the jury to it. The charge given was altogether too favorable to the prisoner ; yet it is better to err on the side of the defendant, in favor of life, than against him ; and, whatever else may be said in this case, it can not be alleged that the law was too harshly laid down by the court. We consider that the circuit court might properly have refused to give any instruction to the jury in this case upon the subject of insanity. There is scarcely a pretence presented by the record for instruction in regard to the prisoner's being insane. A man filling the office of orderly sergeant to his company, in the service of the United States, in such a manner as to be considered the *best orderly* in the regiment—a station which an insane man could not occupy a week without his insanity being discovered—a man showing himself a smart, keen trader in the sale of his horse a few hours before the fatal deed is perpetrated—exhibiting the usual capacity found among men both before and after the deed ; and then to offer as an excuse for his crime the fact that he has been known frequently to get

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into a raging passion, and has been afflicted at times with fits of epilepsy! Upon the state of the evidence presented by the record, the circuit court might well have refused to instruct on the subject of insanity. However, that court gave a very lengthy charge on the subject, and the prisoner had the full benefit of this ground of defence.

As to the evidence not being legally sufficient to warrant the conviction of the prisoner—which is the fifth point made by his counsel in this court—we have only to say, that, from a careful examination of the whole evidence, we can not find any room to doubt the propriety of the verdict. Indeed we are unable to see how the jury could do otherwise than find the prisoner guilty of murder in the first degree. No unprejudiced mind can examine the detail of circumstances produced on the trial below, and preserved in the bill of exceptions, without coming to the conclusion, beyond a doubt, that Gordon was murdered, and that the prisoner was concerned in the murder. The jury were then justified in finding their verdict as they have done in this case. We have now examined the points in the defence, all except the second, and find none of them sufficient to authorize a reversal of the judgment below.

From the affidavit of the defendant Worrell, and the accompanying affidavit in support of his motion for a continuance, there did appear at first some grounds for the motion, and it seemed to us as if the lower court had exercised its discretion to the prejudice of the prisoner; but when we examine the affidavit and find what the prisoner expected to prove by the absent witness Davis, and the absent depositions, and now see the whole case before us, we see that the evidence could not and ought not to have the effect of changing the result of the trial; consequently he was not prejudiced by being ruled into trial. Even if the circuit court may have seemingly exercised its discretion without proper caution at first, (which we do not pretend to say was the case here,) yet when the whole case is presented before this court, and the absent testimony, and the absent witness, from what is alleged

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in the affidavit, may be supposed not to be able to change the result, if produced and present, and indeed ought not to change the result, there can be no injury done to the defendant by ruling him to trial ; and in such cases this court will not reverse. There is nothing then in the second point. We have now considered very carefully and weighed anxiously every point urged by the defendant's counsel for a reversal of this judgment (and the ingenuity of the counsel has left no point untouched), and we come to the conclusion that the judgment must be affirmed. Judge Scott concurring, the judgment is affirmed ; Judge Leonard sick and absent.

[END OF MARCH TERM.]

25	258
98	506
25	258
34 ^a	589
25	258
112	157
25	258
120	122
25	258
148	217
180 ^a	178
25	258
157	463

C A S E S
 ARGUED AND DETERMINED
 IN
 THE SUPREME COURT
 OF
 THE STATE OF MISSOURI,

JULY TERM, 1857, AT JEFFERSON CITY.

NEWBY, Appellant, v. PLATTE COUNTY, Respondent.*

1. The state, by virtue of its eminent domain, has the right to take private property for public use.
2. The state can rightfully exercise this right only in cases of public necessity, and then only upon paying the owner a just compensation.
3. It is competent for the legislature to provide that, in determining the just compensation to which the owner of property appropriated to public use is entitled under the constitution, the benefits and advantages accruing to such owner in respect of the residue of his property unappropriated, in consequence of the use to which the part taken is applied, shall be taken into consideration. (SCOTT, J., dissenting.)
4. This right of providing that benefits and advantages shall be taken into consideration in determining the just compensation required by the constitution is based upon the general taxing power.
5. Such a provision is in effect an assessment or tax on benefits ; being such, and not a tax on property, properly speaking, it is not in conflict with the provision of the constitution requiring that all property subject to taxation shall be taxed in proportion to its value.

* This case and that of Walther v. Warner et al., immediately succeeding, were decided at the January term, 1857, of the Supreme Court. The opinions of the court were not however filed until after the close of the July term.—[REF.

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6. The seventeenth section of article 2 of the general act of 1845, "for opening and repairing public roads and highways," (R. C. 1845, p. 974,) providing that in assessing the damages sustained by a person by reason of a road's passing over his land "the commissioners shall take into consideration the advantages as well as the disadvantages of the road to such person," is in harmony with the constitution.
7. The benefits to be charged against the adjacent land owners are, it seems, the direct and peculiar benefits resulting to them in particular, and not the general benefit accruing to them in common with other land owners from the building of the road.

Appeal from Platte Circuit Court.

P. R. Hayden, for appellant.

I. Newby was entitled in damages to the full value of his land appropriated and taken for the road, and the court in the assessment thereof had no right to take into consideration the probable or *incidental advantages* which might or should accrue to Newby from the road in its enhancement of the value of his adjacent lands. (See Constitution of Missouri, article 13, section 7; 5 Dana, 32; 7 Dana, 87; 9 Dana, 114.)

LEONARD, Judge, delivered the opinion of the court.

A great diversity of opinion has prevailed among speculative writers as to the origin of private property. The ancients, it is said, generally held property to be the gift of the Deity, but the nations of modern Europe have regarded it as an institution of the positive law. It would seem, indeed, to be a necessity of our nature, and precedes the establishment of civil government. Man can not live without it, and accordingly rights of property have always existed in every country. In every form of society there are circumstances under which things constituting the necessities and comforts of life are held to belong to a man so as to be his property. Indeed, one of the main purposes for which civil government exists among men, is the protection of private property ; and in providing this protection the civil law must necessarily ascertain and define the things that may be the objects of

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ownership, and prescribe and limit the powers of the owner over them.

In this manner and to this extent property may justly enough be considered an institution of the civil law; but when it is thus established by the municipal law, the legitimate authority of the civil government over it would seem to be confined to a just control over the owner in respect to the use he may make of it—to the requiring of contributions from it to meet the public burdens, and to the taking of it for the public use when required for that purpose; and such seems to be the opinion of the writers on public law. Puffendorf, treating of the power of the state over private property, says: “It may, I think, be properly enough reduced to three general heads: first, the right of making laws to direct the proportion in the use and consumption of certain goods; (sumptuary laws—laws against prodigality, &c.); secondly, the right of levying taxes; and thirdly, to the exercise of the transcendental propriety;” (book 8, chap. 5, § 3;) and the practice of all civilized nations has, in good times, always conformed to this.

As to the eminent domain, the “transcendental propriety,” as it is here called, all writers on public law agree that the state can not rightfully exercise it except in cases of public necessity, and then only upon yielding the owner a just compensation. Grotius tells us that “the property of subjects is under the eminent domain of the state, so that the state, or he who acts for it, may use and even alienate and destroy such property, not only in cases of extreme necessity—in which even private persons have a right over the property of others—but for the ends of public utility; to which ends those that founded civil society must be supposed to have intended that private ends should give away; but it is to be added that when this is done, the state is bound to make good the loss to those who lose their property.” (De jure Belli et Pacis, Lib. 3, chap. 20, Whewell’s ed.) Puffendorf, too, speaking of the extent of the right of eminent domain, observes: “It is agreeable to natural equity that when contributions are to

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be made for the preservation of a particular thing by such as enjoy it in common, that every man should only pay his quota, and that one should not be forced to bear more of the burthen than another, and the same holds in commonwealths; but because the state of the commonwealth may often be such that either some pressing necessity will not give leave that every particular subject's share should be collected, or else that the public may have necessary occasion to make use of something in the possession of one or more of the private subjects, the sovereign power may seize upon it for the necessities of the commonwealth; but, then, *all that was above the proportion that was due from the proprietors must be refunded to them by the rest of the subjects*" (book 8, chap. 3); and the doctrine and practice of all civilized nations correspond with what is thus laid down by these writers.

No principle in English jurisprudence is better settled than that an individual can not be deprived of his property except for the public use and for a just compensation, and the British parliament accordingly never authorized one individual's property to be taken for the private benefit of another upon any terms, nor for the public use, without first providing a just equivalent for the owner. (1 Black. Com. 139.) The emphatic declaration of the French law (Civil Code, art. 545) is that "no one can be compelled to give up his property except for the public use and for a just and previous indemnity." And an anecdote related by De Tott, in his Memoirs of the Turkish Government, shows that the same principle is equally respected in that despotic government. The Sultan Mustapha, being desirous of building and endowing a new mosque, fixed upon a spot in the city of Constantinople which belonged to a number of individuals, and treated with them for the purchase of their parts. They all complied with his wishes except a Jew, who owned a small house on the place, and refused to part with it for any price. The Sultan consulted his Mufti, and they answered that private property was sacred, and that the laws of the Prophet forbade his taking it absolutely, but that he might

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compel the Jew to lease it to him as long as he pleased at a *full rent*. The Sultan submitted to the law.

But in Europe this principle is, in reference to the action of the government, a mere moral rule, imposing no legal restrictions upon the legislative authority ; while the American people, by incorporating it into their constitution, and making it a rule of constitutional law, of superior obligations to the enactments of the legislative department, have placed private property under judicial protection, against all efforts on the part of the government to take it from the owner, except under the circumstances and upon the terms recognized as just and proper by the general sense of mankind and the uniform practice of civilized nations ; and they have thus given to private property a security altogether unknown to the legal systems of Europe. Our constitutional provision, it is true, does not, like the declaration of the French law, prohibit in express terms the taking of private property in any case except for the use of the public, so as directly to deny to the legislature the power of transferring property from one person to another for any mere private purpose ; yet all this is sufficiently implied ; and accordingly, in the construction of the provision, it is always assumed that there must be not merely a just compensation, but that the use to which the property taken is to be applied must be a public use in order to authorize the exercise of the power. The questions, therefore, that have been discussed in the courts in the construction of this clause—which is to be found in almost every American constitution—are, what is a public use within the meaning of this provision ? and, what is the just compensation required by the constitution ? Must it be the whole money value of the property without any deduction ? or, is it competent for the legislature to provide that the increased value imparted to the residue of the party's land, by the use to which the part taken is applied, shall be deducted from the compensation to be paid ? And the last is the question involved in the present case.

The 17th section of the 2d article of the general road law

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of 1845, (R. C. 1846, p. 974,) provides that, in assessing the land owner's damages, the commissioners "shall take into consideration the advantages as well as the disadvantages of the road to such persons." The present road was authorized to be established as a state road by the special act of the 7th February, 1849, and the proceedings for this purpose are directed to be according to the general road law of 1845, and the amendatory act of the 25th of January, 1847. On an appeal from the county court, the plaintiff's damages as a land owner were assessed in the circuit court by the court in lieu of a jury, on an agreed statement of the facts, and the circuit court, when applied to for that purpose, refused to declare that the plaintiff "was entitled to the value of the land taken for the road, and that the advantages of the road to him could not be set off against his claim for the value of the land," and decided that the plaintiff was not entitled to any money compensation for the land taken for the public use; and thus the validity of the statute provision to which we have referred is submitted to our judgment by the present proceedings. If the state government possessed no authority over private property except that of taking it for the public use upon rendering the owner a just compensation, it would seem that, under this provision, the owner would be entitled to the full money value of his property without any deduction. The rule of constitutional law being that private property can not be taken for public use, by the authority of the legislature, without a just compensation, it follows that what is to be considered as compensation within the meaning of the clause is a question of law for the courts, and not a matter for the legislature; and, under such a constitution as we have supposed, with no other power over private property than that of taking it for the public use upon making the owner a just compensation, it would be quite beyond the scope of the legislative authority to declare that the benefit derived by the land owner from the road is the just compensation secured by the constitution. If the provision were that the owner should be indemnified against the act complained of,

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it might be insisted, that, in ascertaining the extent of the damages sustained, the advantages as well as the disadvantages resulting from the act must be taken into consideration ; and this seems to be the view taken of the subject by the Supreme Court of Ohio, in Simonds and others against Cincinnati, (14 Ohio, 174,) under the constitution of that state, which expressly requires the compensation to be made in "money." But that is not the language nor the scope of the provision. The declaration of the constitution is, that no private property ought to be taken or applied to public use without a just compensation ; and this would seem to imply that the party should receive the value of his property in money. The transaction is a forced sale to the public, and the constitution in this provision secures to the owner the just price of his property as the only condition upon which he can be lawfully deprived of it.

The government, however, possesses other powers over private property besides the right of eminent domain ; and if, in the exercise of the taxing power, the government may lawfully require the adjacent land owners to contribute towards paying for the right of way in proportion to the benefit each will derive from the road, the present enactment, so far as it directs the advantages of the road to be deducted from the price of the land, must perhaps be considered as an exercise of the taxing power. This law is, indeed, nothing more in effect than the exercise of both powers of government in the same breath—that of taking the land by the right of eminent domain, and of requiring, under the taxing power, the adjacent land owners to contribute to the cost of it in proportion to the benefit each will derive from the road. We have an instance of express legislation of this character in the St. Louis charter amendment act of the 23d of February, 1853, where it is provided that when it shall become necessary, in order to improve any street, &c., to take private property, the jury shall first ascertain *the value of all the ground* proposed to be taken, and then assess against the city, for the payment of this debt, a sum equal to the value of the improvement to the

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general public; and the balance of the money necessary to pay for the ground they shall assess against the owners of the lots fronting on the street according to the value of their lots, and in the proportion that they will be respectively benefited by the improvement. Under this act, and the ordinance passed to carry it into execution, when the whole lot is taken, the owner receives the whole value of it in money; but when part only is taken, the value of the part taken and the amount of benefit the owner will derive from the improvement of the street in respect to the residue of his lot are assessed separately, and one being set off against the other, the owner receives or pays the balance as it turns out to be for or against him. Under the St. Louis act, the city pays towards the cost of the ground a sum equal to the value of the improvement to the city generally, and the residue of the cost is apportioned among the adjacent lot owners in proportion to the benefit derived respectively from the improvement. Under the provisions of the general road law, the adjacent land owners pay towards the cost of the right of way the value of the improvement to themselves—not exceeding however the value of the land taken from them respectively—leaving the balance of the cost to be paid by the county. Under the St. Louis act, the sums to be paid by and to the adjacent lot owners are assessed separately, and when part only of a proprietor's lot is taken, one amount is set off against the other, and the balance only is settled in money. Under the road law, the benefit is in every case deducted from the value of the land taken, and the balance only is formally ascertained and declared; thus what is formally gone through with under the St. Louis act, step by step, is done substantially at one blow under the road law. In both cases the legislature exercises the same power over private property, and no other; and although in one case the language employed has a more direct reference to the taxing power than in the other, we are not at liberty, we think, on that account to treat the provision in one act as a prohibited invasion of private property, and to give effect to it in the other as an

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exercise of a lawful power. If the legislature may, under the taxing power, lawfully require the contribution, and if this provision in the road law be substantially such a requisition, as we think it is, we are not at liberty to treat it as a nullity, but must give effect to it accordingly. In a case now before us at St. Louis, (*Garrett v. St. Louis*), under the St. Louis act before referred to, part of the plaintiff's lot was taken for the improvement of Main street, and he insists upon being paid the whole assessed value of the part taken, without any deduction on account of the assessment against him for benefits in respect to the residue of his ground ; and the question there is as to the validity of what is in that case express taxation for a local object—while in the present case it is as to the validity of what is in effect, though not in words, a like assessment for a like purpose.

In both cases the only question, as it appears to us, is as to the competency of the legislature to require the adjacent land owners to contribute towards the cost of the ground for a road or street, in proportion to the benefit ; or, to state the proposition in more general terms, it is as to the constitutional validity of taxes imposed by a subordinate authority in the state upon an arbitrary district of country in proportion not to the value of the property, but to the benefit to be derived by the owner from the improvement.

Upon this question we begin by remarking that the power of taxation, as well as the more subordinate power of taking private property for the use of the public, without any reference to the owner's duty to contribute to a common burden, exist and are exercised of necessity in every nation as legitimate powers of civil government, and appertain to our state government as part of the legislative power, without any express grant for that purpose. The right of eminent domain is, in its nature, capable of being limited and regulated in some degree by general rules, and has accordingly, as we have already remarked, been confined in all civilized states by the practice of government, and in our American republics by express constitutional provision, to cases of public

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necessity and convenience, on the payment to the owner of a just compensation. But the power of taxation is more indefinite in its character, and less capable of limitation by general rules of law.—the amount of money to be raised, and to what purpose it shall be applied, and the persons and things that shall contribute to it and according to what rule of apportionment, are all matters left almost of necessity to the discretion of the legislative department—the only express limitations in our constitution upon the taxing power being that “all property subject to taxation shall be taxed in proportion to its value,” and the prohibition against taxing the lands of non-residents higher than residents’ lands.

The validity of the enactment now under consideration, considered as an exercise of the taxing power, is not questioned upon the ground of its being a local tax. There are everywhere, in all civilized states, two sorts of public expenditures—those that concern the whole state in general, and those that are confined to its civil sub-divisions and lesser localities, and both justice and convenience require, and have accordingly introduced into the practice of all governments, corresponding general and local taxation. (Domat, Pub. Law Book, 1, tit. 5, secs. 1 and 5.) Our own practice, corresponding with the general practice of the other states, has been to meet the general burdens by general taxation, and to make it the duty of the local authorities to raise and expend within their respective limits, under such restrictions as the legislature should deem proper, the taxes applicable to the local public service. The manifest equity and convenience of these local assessments, for the accomplishment of local purposes, has brought them more and more into general use, confining them, in very many instances, to very small localities; and no one now questions their validity, although at an early day the constitutional validity of taxation levied by subordinate tribunals was questioned, on the ground that it was levied without the consent of the people or their representatives; or, in other words, that it was an exercise of the legislative power of taxation which it was not competent for

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the legislature to delegate to others. (County Levy Case, 5 Call, 139.) That objection, however, was overruled in the case in which it was made, and has never been regarded in American legislation.

The objections that have since been relied upon to these local assessments for local improvements are that it is not "legitimate taxation," and that in this state, under our constitution, they are not valid as taxes, because they are apportioned according to the benefit and not according to the value of the property as required by the constitution. The position assumed is that "legitimate taxation is limited to the imposing of burdens or charges for a public purpose equally upon the persons or property within a district known and recognized by law as possessing a local sovereignty for certain purposes, as a state, county, city, town, village, &c.;" and consequently road and street and other similar assessments for local improvements are no other than the taking of private property, under color of the taxing power, without providing the compensation required by the constitution. This idea, it is believed, was first formally announced in New York, in the case of *The People v. Mayor of Brooklyn*, 6 Barb. 216, and is said to have originated in the court of appeals of Kentucky, in the case of *Sutton's heirs v. City of Louisville*. (5 Dana, 28.) The New York case was an assessment on a lot owner in proportion to the benefit for the purpose of building a sewer, and the Kentucky case was a similar assessment for the extension of a street, and both assessments were decided to be unconstitutional, as not being legitimate exercises of the taxing power. The New York case, however, was reversed on appeal, in the court of appeals; (4 Comst. 428;) and the doctrine itself seems to have been subsequently abandoned in effect in Kentucky, in the case of the *City of Lexington v. McMillain's heirs*, 9 Dana, 513, by the same court, composed of the same judges, in which it originated. In the latter case, Lexington was authorized by its charter to cause the streets to be paved at the expense of the lot owners in each square, either upon the

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application of the greater part of them, or without such application by the unanimous consent of the mayor and council; and one question being as to the validity of an assessment that had been made pursuant to an ordinance passed with the required unanimity, the court held it valid, suggesting that *each square might be considered an independent municipality for this purpose*. Upon principle, there is nothing, we think, in the objection.

In distinguishing taxation from the taking of private property under the right of eminent domain, it has been well observed that taxation exacts property from individuals as their respective shares of contribution to a public burden. Private property taken by the right of eminent domain is not taken as the owner's share of such a contribution, but as so much beyond it. Taxation operates upon a class of persons or things, and by some rule of apportionment. The exercise of the right of eminent domain operates upon individual persons or things, and without any reference to what is exacted from others. The present tax, if we may consider it as one, operates upon a class of persons—the owners of the several tracts of land over which the road passes—is assessed against them in proportion to the benefit each derives from the improvement, and is exacted from them as their respective shares of contribution to the establishment of the road. We may remark, too, that taxation of this character has prevailed too long and too extensively to be treated as illegitimate, or denounced as legislative spoliation under the guise of the taxing power. It prevailed in England several centuries ago; and the assessments made there by the commissioners of sewers on the lands affected by their operations was taxation of this character. (28 Hen. VIII, chap. 5, sec. 5.) In Massachusetts, from an early period, meadows, swamps and low-lands were required to be assessed among the proprietors to pay the expense of draining them, (Rev. Stat. of Mass. p. 673,) and in Connecticut the same power was given to commissioners for draining marshy lands. (Conn. Stat. ed. 1839, p. 544.) It is said by the judge, who delivered the

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opinion of the court of appeals in the Brooklyn case before referred to, that the system of local taxation for local improvements, by assessing the burden according to the benefit, had prevailed for more than one hundred and fifty years, and that this power was given to the corporation of New York in 1691, and had since been conferred on nearly every city and on many of the villages of the state. We are informed in the opinion of the Supreme Court of Kentucky, in the Lexington case before referred to, that the assessment of benefits for the improvement of streets had been sanctioned as constitutional in Louisiana, South Carolina, and Pennsylvania; had been virtually recognized by the courts in New York and Massachusetts, and had never been declared unconstitutional by any court, so far as they had been able to ascertain; and we may ourselves remark that similar taxation is authorized by law in New Jersey, Maryland, Virginia, Ohio and Indiana, and either acquiesced in by these communities or adjudged valid by their courts. Finally, the validity of local assessments of this character was considered and affirmed in this court at our last St. Louis fall term, in the case of Lockwood v. The City of St. Louis, 24 Mo. 20, where the assessment was to construct a common sewer, and was levied on all the lots in an arbitrary district—laid off by the corporation for the purpose of constructing the sewer.

The only difference between that and the present case, if we may look on the provision of law we are now considering as an exertion of the taxing power, is, that there the assessment was in proportion to the *value of the lot*; here, it is in proportion to the *benefit to accrue to the owner of the ground*. That case, therefore, does not touch the objection that the present assessment is invalid as a tax by reason of our constitutional provision requiring all property subject to taxation to be taxed according to its value. This, as we have already remarked, is one of the two express limitations to be found in our constitution upon the taxing power, and was the subject of a good deal of discussion in the case of Crow v. The State, 14 Mo. 237. Whether the effect of the provision be to re-

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quire the legislature, in laying a property tax, to tax *all the property in the state* subject to state taxation, without omitting any, or whether it only requires them to tax, *without discrimination, all the objects of property that they may select for taxation*, or whether the clause is satisfied by *taxation levied according to the value of the taxed property* and not arbitrarily at specific sums fixed by the legislature, as the judges in the case referred to seem to have respectively thought, we need not stop to inquire—the question before us being whether an assessment of this character is a property tax within the meaning of this constitutional provision. A system of taxation framed exclusively with a view to a just distribution of the burdens of government among its citizens would require that each should contribute in proportion to the benefit he received. But as the amount of benefit each derives from the general expenditures of the government can not be ascertained with any reasonable certainty, *the benefit received* can not be adopted as a standard for the apportionment of general taxation. The rich however derive more benefit from the government in the protection and improvement of their property, and therefore a tax against a person in proportion to his property, levied not arbitrarily but according to its value, apportions the burden according to the benefit more nearly than any other rule of general taxation, and is therefore adopted as the most equitable tax to defray the general expenses of the state. In local taxation, however, for local objects, the personal benefit to each, it is supposed, may be seen and estimated with a reasonable degree of certainty, and therefore, in such assessments, it is deemed fairer that each should contribute in proportion to the benefit.

Our state revenue is assessed against persons in respect to such of their property as the legislature select for taxation, and in proportion to the value of it; while formerly, under the territorial government, it was levied arbitrarily on property at specific sums, fixed by the legislature (Geyer's Dig. Revenue, secs. 1, 2, 4, 9); and certainly one effect of the constitutional provision under consideration is to forbid the

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ancient mode of assessment, and to require the legislature, in the imposition of taxes on persons in respect to their property, to assess them according to the value of the property selected as the objects of taxation, and not at arbitrary, fixed rates prescribed by the legislature. But we can not suppose it was the intention of the people of this state to suppress entirely that large class of assessments, felt to be so just and equitable and which for that reason had been introduced so generally into practice, in which each is required to contribute to the burden in proportion to the benefit he derives from the expenditure. When the taxation is against one in respect to his property as property, when he is assessed for a property tax, the assessment must be according to the value of the taxed property; but here the property is assessed in respect to the benefit he derives from the improvement; it is a tax on the benefits rather than a tax on the property, and therefore is not obnoxious to the constitutional prohibition we are now considering. The result is, it was competent for the legislature, in the exercise of the taxing power, to require the adjacent land owner here to contribute towards the road in proportion to the benefit; and the provision in the general road law, that is complained of as unconstitutional, is in effect an exercise of this authority. And we remark in this connection that there is a marked difference between general taxation and special assessments for local objects, and that the word tax may be used in a contract or in a statute so as not to embrace within its meaning local or special taxes, although both kinds of taxation derive their authority from the general taxing power; and accordingly, although in Lockwood's case, before referred to, we held that church property was not exempt from the special sewer tax authorized by the St. Louis general sewer act, yet it was not suggested or supposed that the assessment was not made under the authority of the general taxing power of the state.

Our conclusion in favor of the validity of the provision under consideration, to which we have thus come by considering the question on principle, is corroborated by the mass

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of judicial decisions in the other states on the subject. The American constitutions generally, as already observed, contain the same provision for the protection of private property to be found in our own, and a similar statute provision has been generally adopted throughout the United States in reference to the assessment of the damages for land taken, whether by the public or by private corporations, for public roads and canals, as well as for turnpikes and plank roads and railways ; and Virginia, Kentucky and Tennessee are, we believe, the only states in which the provision has been treated by the courts as invalid. (James River and Kanawha Co. v. Turner, 9 Leigh, 315-341 ; Woodfolk v. The Nashville and Chattanooga Railroad Co. 2 Swan, 422, and Jacobs v. The City of Louisville, 9 Dana, 114.)

In many of the states its constitutional validity has been expressly affirmed by the courts, while in others it has been silently acquiesced in, and we refer to the following authorities for the course of American legislation and judicial decisions upon the subject. In many of these cases the decision is put on the ground that the government is only bound to indemnify the owner against whatever damage may result to him from the application of his property to the public use, which, although different from the ground on which our decision is placed, produces under our existing laws the same practical result in the assessment of the damages. (Mass.—Rev. Stat. chap. 24, sec. 31 ; Commonwealth v. Combs, 2 Mass. 492 ; Commonwealth v. Sessions of Middlesex, 9 Mass. 370 ; Commonwealth v. Norfolk Sessions, 5 Mass. 436. New York—2 Rev. Stat. 412 ; Livingston v. Mayor of New York, 8 Wend. 80 ; The People v. Mayor of Brooklyn, 4 Comst. 428. Pennsylvania Railroad Co. v. Heister, 8 Penn. State Rep. 447; McMasters v. The Commonwealth, 8 Watts, 294. Ill.—Alton & Sangamon Railroad Co. v. Carpenter. 14 Ill. 199. Ohio—Symonds v. City of Cincinnati, 14 Ohio, 147. Alabama—Code 1852, p. 257, sec. 1136. 27 Miss. 210. Vermont—Compiled Stat. of 1850, p. 173, sec. 67. Maryland—5 Gill. 388 ; 1

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Mary. 540; 5 Mary. 314. Indiana—The State v. McIntyre, 5 Blackf. 386.)

As to our own legislation, we remark that the first American road law passed here was enacted by the governor and judges of the territory of Louisiana on the 6th of July, 1806, by which it was made the duty of the jury empanelled to assess the damages, to certify to the court their opinion “whether any damage, and, if any, how much damage would accrue to the owner of the ground by the passing of the road through the same.” The provision, in substantially the same language, was reënacted in 1814 by the territorial legislature, and has been successively reënacted, in the same language, at every revision of our laws since, down to the present time. At the revision of 1845 a second article in reference to state roads was added to the road law; and the 17th section of that article, expressly requiring the advantages as well as disadvantages to be taken into consideration in the assessment of the damages, is a new provision then for the first time introduced into the revised statutes, and which was then, it would seem, confined to state roads, although in the last revision it has been extended to county roads.

But, although the first article of the act of 1845, in reference to county roads, does not expressly require the advantages as well as the disadvantages to be taken into consideration in the assessment of the damages, yet this seems to be required in effect by confining the compensation to be allowed to the owner to “the damages he may sustain by reason of the road’s passing through his land.” The road law of the Northwest territory, passed at Cincinnati in 1799, provided that the persons chosen to assess the damages of those through whose land a public road was proposed to be run “should take into their consideration how much less valuable the land would be rendered by reason of the contemplated road and assess the damages accordingly.” This provision seems to have continued in force in the territory until the whole country was successively organized into states, and the courts of these states

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have put upon the provision in their constitutions, where the question was as to the compensation to be allowed for land taken for roads, the same construction that was given to their ancient road act, which was that it secured to the owner not the price of the property taken but a *recompense for the actual injury sustained*, taking into consideration the advantages as well as the disadvantages to result from the act. (McIntyre v. The State, 5 Black. 386.) Now our act of 1845 in reference to county roads, although not identical in language in this particular with the old territorial law from which it was probably taken, would seem to impose the same injunction in reference to the assessment of damages that is tacitly enjoined in the territorial law and expressly commanded in our act of 1845 in reference to state roads, and in our act of 1855 in reference to all roads both state and county. This, however, we are not now called on to determine, as the 17th section of the second article of the road law of 1845 is applicable to the present proceeding, and the language there used is such as to leave no doubt as to the effect of the law, if the legislature have the constitutional power to require what they have commanded.

But, although we concur with the circuit court in thinking this section of the road law constitutional, yet the judgment must be reversed upon another ground. The only facts agreed between the parties, and upon which the decision was pronounced, were, that the road ran "through the plaintiff's land one hundred and twenty-two poles, and occupied one and one-half acres of ground, worth fifteen dollars per acre;" but it was not admitted that the road was any benefit to the party, and the court, we think, could not infer this as a matter of law from the agreed facts, and pronounce against allowing the plaintiff any compensation for the property of which he was deprived.

As to the proper rule by which to compute the benefits in cases of this character, it may not be improper, as the case is to be remanded for further proceedings, to remark that the Supreme Court of Massachusetts, in the case of Meacham v.

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The Fitzhugh Railroad Co., 4 Cush. 392, declared that the benefits to be charged against the adjacent land owners and deducted from the compensation to be paid to them, were the direct and peculiar benefits that would result to them in particular, and not the general benefit that they would derive in common with other land owners from the building of the road ; and this seems to be substantially the principle adopted by our own legislature as just and equitable in the St. Louis street improvement act before referred to, and ought perhaps to be followed in the construction of this provision of the road law. In reference to the disadvantages, it is to be observed that the constitution only secures to the owner the price of his property, but it is competent for the legislature to go beyond this, and not only pay him the value of his property, but also indemnify him against any damage that will result to him from the use to which it is to be applied ; and this they have effected by requiring the *disadvantages* as well as the advantages to be taken into consideration in the assessment of the damages. Judge Ryland concurring, the judgment is reversed, and the cause remanded.

SCOTT, J., dissenting. I dissent from so much of the opinion of the majority of the court as maintains that, in the computation of the damages to be paid to the owner of the property taken for public use, regard must be had to the advantages and disadvantages resulting to such owner from the use to which the property may be applied. The value in cash of the thing taken, considering its place and situation, is the compensation contemplated by the constitution to which the owner, as such, is entitled. The legislature may compensate disadvantages with advantages, but the value of the property taken must be paid for in money.

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**WALTHER, Plaintiff in Error, v. WARNER, et al., Defendants
in Error.**

25	277
103	312
25	277
116	538

1. The building of a railroad by a private corporation, under the authority of the legislature, for the accommodation of the public, is a public use for which private property may be lawfully taken.
2. Legislative acts authorizing the taking of private property for public use are unconstitutional unless they provide the owner with a proper remedy to obtain a just compensation.
3. This remedy must be an efficient one; there must be an adequate fund, and an appropriate legal remedy to enforce its application; a judgment against a private corporation is not sufficient.
4. In proceedings instituted by the Pacific Railroad Company to obtain title to land upon which said company had located its railroad, a judgment was rendered against the company for the damages assessed, and an order was made transferring the title to the land to the company; *held*, that actual payment of the damages was essential to the vesting of the title in the company; no entry upon said land prior to such payment for the purpose of constructing the railroad could be justified.
5. It is competent, it seems, for the legislature to authorize entries upon private property without compensation for the purpose of making examinations and surveys preliminary to the location of a railroad.

Error to Cole Circuit Court.

Parsons and Morrow, for plaintiff in error.

I. The court should have sustained the motions to strike out so much of defendants' original answer as justified the entry upon and taking the land by virtue of the "act to incorporate the Pacific Railroad," approved March 12th, 1849; the "act to expedite the construction of the Pacific Railroad and the Hannibal and St. Joseph Railroad," approved February 22d, 1851; the act to amend the act entitled "An act to incorporate the Pacific Railroad," approved March 1st, 1851, and the "act to authorize the formations of railroad associations and to regulate the same," approved February 24th, 1853. Said answer does not allege that the Pacific Railroad Company performed the conditions required of it by the 9th and 10th sections of the "act to incorporate the Pacific Railroad," approved March 12th, 1849, and by the 14th, 15th, 16th, 17th and 18th sections of the "act to authorize the for-

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mation of the railroad associations and to regulate the same," approved February 24th, 1853.

The right of entry and possession under this act exists only after the payment of the damages assessed, which payment is not alleged in the answer. It is manifestly defective under this statute. (See *Bloodgood v. Mohawk & Hudson Railroad Company*, 18 Wendell, 9.) The 56th section of this act makes the sections above cited applicable to the Pacific Railroad Company.

II. The act of 1849, incorporating the Pacific Railroad Company, does not give the company the power to take private property before making compensation for the same. (See sections 9 and 10.) The construction of these sections, as contended for by the defendants, is unconstitutional. (Constitution of the United States, amendments art. 5 ; Constitution of Missouri, art. 13, sec. 7.) Just compensation, as meant by the constitution, is a certain and complete reparation in money for the property taken. The payment must not depend on any contingency. The owner of the property can not be compelled to surrender it, and credit a corporation which may be solvent to-day and insolvent tomorrow. It is by no means certain that corporations will pay all their liabilities. A promise from them or any of them is not the certain compensation intended by the constitution. The proper construction of the act is that the compensation for the property taken must be made before or at the time it is taken and appropriated. (See *Bloodgood v. Mohawk & Hudson Railroad*, 18 Wendell, 9 ; *Blanchard v. Maysville & Lexington Turnpike Co.* 1 Dana, 86 ; 25 Wendell, 464 ; 3 Hill, 567 ; 2 Kent, 339 ; 3 Howard, 240 ; 9 Georgia, 347.)

III. The supplemental answer set up nothing more by way of defence than is contained in the original, except that the Pacific Railroad Company has taken steps to have the plaintiff's damages assessed, and that advantages accrue to him by the construction of the road. The objections to the original apply with equal force to the supplemental answer.

The supposed advantages to the plaintiff resulting from the

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alleged trespass could not be pleaded as a defence. (7 Maine, 386; 9 Dana, 114; 5 Dana, 28; 7 Dana, 81.)

IV. The proceedings in the case of the Pacific Railroad Company against the plaintiff were inadmissible as evidence in this case. The award of the commissioners was not warranted by the law, and the judgment of the court upon the award in giving judgment for crossings was not authorized by the law. The act under which said proceedings were had requires compensation for damages to be in money. (See 16th, 17th and 18th sections of the "act to authorize the formation of railroad associations and to regulate the same," approved February 24th, 1853; 18 Pickering, 448.)

V. The court should have given the 1st, 2d, 3d, 4th, 5th, 6th and 7th instructions asked by plaintiff, and should have refused the 2d, 3d and 4th asked by defendant. See authorities cited in the 1st, 2d and 3d points made by plaintiff in error. (Gallaher v. Gates, 20 Mo. 287; Cooper County v. Geyer, 19 Mo. 257; Baldwin's C. C. 206; 9 Ga. 356; 26 Wend. 497; 3 Kelly, 45.)

Gardenhire, for defendant in error.

I. The charter of the company gave them full power to survey, mark, locate and construct a railroad over the land of the plaintiff in error without previously ascertaining and paying or tendering him the damages. (Laws of 1849, 220, 221, secs. 7, 9 and 10.) It gave him a judgment against the company for the amount of damages assessed, and the company an order simultaneously with the judgment, vesting in them the fee simple title of the land. The mode of acquiring title to land by railroad associations, prescribed by the 13th, 14th, 15th, 16th, 17th and 18th sections of the act of February 24th, 1853, to authorize the formation of railroad associations and to regulate the same, (Sess. acts 1853, pp. 128-131; R. C. 1855, pp. 414-19,) is not applicable to the Pacific Railroad.

II. The charter of the Pacific Railroad is constitutional, although it vests in the company the fee simple title of the

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land upon judgment against them for the damages assessed. (1 Baldw. C. C. 226, 227; 3 How. Miss. 250; 6 Wend. 684; 14 Wend. 51; 12 Mass. 483; 7 N. Hamp. 70, 71; 25 Verm. 66; 81 Maine, 215; 35 Maine, 323; 1 Foster, 359; 9 Conn. 436; 2 Kent, Com. 399; 20 Johns. 744.) The constitutionality of the general law in regard to roads and highways has never been attacked, and yet it is subject to the same objection as the charter of the Pacific Railroad. (R. C. 1855, p. 1872-3, secs. 21-25.) The authorities denying the constitutionality of the law admit the right of entry for the purpose of locating the road. This gives up the tort; for it may and usually does become necessary in locating the road to destroy the timber and sink shafts on the line of the survey. What is the difference in principle between cutting timber and digging up the soil in *locating* the road, and doing the same thing in constructing it? *Locating* the road is not *taking* the property; neither is *constructing* it *taking* it. One, however, is just as permanent a use of the land as the others. Taking can be nothing less than the divestiture of the fee. Neither the location nor construction of the road does this. The fee is still in the land owner with powers to force the vendees of the law specifically to perform the contract made by the law. (1 Amer. R. C. 167, note.)

III. The charter of the company provides a remedy for the land owner to recover damages for the location and construction of the track across his land; and it is exclusive of the remedy at common law. Lawful authority being given to take the property for public use, the act of taking was justifiable, and no action for a *tort* will lie. (See 1 Amer. R. C. 166, note 1; 7 Ad. & El. 124; 3 Eng. Law & Eq. 59; 6 ib. 179.) The land owner may by mandamus compel the company to have his damages assessed and paid. (5 Pick. 323; 5 Watts, 152; 1 Barb. 34; 4 Barb. 64; 31 Maine, 272; 1 Ohio State Rep. 77, 105; 9 Smede & Marsh. 77, 90; 17 Ala. 530; 18 Wend. 18.) He may also have an injunction, in a proper case, until they are assessed and paid. (2 Kent, 399, 400, note

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a; 20 Johns. 744, 745; 1 Baldwin's C. C. 226; 3. How. Miss. 250; 2 Story's Eq. sec. 959, *b.*) These remedies admit the constitutionality of the law and enforce its execution in a constitutional way so as to protect private rights. The action of the plaintiff in error denies it, denies in fact the right of eminent domain, and treats the executors of the law as trespassers.

LEONARD, Judge, delivered the opinion of the court.

The questions in the present case relate to the proper construction of our constitutional provision prohibiting private property from being taken for public use without a just compensation. We have remarked, in an opinion delivered at the present term, (*Newby v. Platte co.*, ante p. 258,) what in deed seems to be unquestionable, that there is in this provision an implied prohibition against the taking of private property for any purpose other than for public use. And, accordingly, the particular questions to which our attention is now called are whether the use of the plaintiff's property by the company for the construction of their road is a public use within the meaning of the constitution, and if so, whether, under our constitution and the laws applicable to this transaction, it was lawful for the company under the circumstances of the case to enter upon the plaintiff's land for the purpose of constructing their road. The first point has not been contested here, and no matter what doubts in reference to it may have been formerly entertained, we suppose it must be considered as now settled by the course of American decision that the building of a railroad by a private corporation, under the authority of the legislature, for the accommodation of the community, is a public use for which private property may be lawfully taken. The other point involves the inquiry, whether the defendant's entry upon the plaintiff's land, in order to construct the road, was authorized by the legislature; and if it was, whether these legislative provisions are consistent with the constitution. And we may

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consider the last question first, as the determination of it against the power of the legislature will supersede the necessity of considering and deciding the other.

The 7th section of the act of March, 1849, to incorporate the Pacific Railroad Company, gives them authority "to survey, mark, locate and construct" a railroad from the city of St. Louis to the city of Jefferson, and thence to some point on the western line of Van Buren county, and to hold a strip of land not exceeding one hundred feet wide, and other sufficient lands for depots, &c., and "to select such route as they may deem most advantageous;" and the subsequent actions provide a mode by which the company may acquire the land for the road, when they can not agree with the owners, and for this purpose the act directs that the proper court shall, after the assessment of the damages in the manner provided by the act, "render a judgment for them against the company and in favor of the owner, and make an order vesting in the company the fee simple to the land." The general railroad law of February, 1853, after providing for the formation of railroad companies, authorizes them "to lay out their roads not exceeding one hundred feet in width, and to construct the same," and "to purchase, hold and use all such real estate as may be necessary for said roads and the stations and other accommodations necessary to accomplish the object of their incorporation," and "to cause such examinations and surveys for their proposed railroads to be made as may be necessary to the selection of the most advantageous route, and for such purpose, by their officers, agents or servants, to enter upon the land or waters of any person, but subject to responsibility for all damages that shall be done thereby." This act also provides a mode by which all companies, whether formed under that law or incorporated by a special act of the legislature, may, when they can not otherwise obtain it, acquire the necessary land for their roads; and for this purpose the act directs that "the damages shall be assessed by commissioners to be appointed upon the petition of the company," and that upon the confirmation of the commissioners'

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report by the proper court or judge such court or judge shall make an order reciting the substance of the proceeding and directing to whom the money is to be paid, and that a certified copy of this order shall be recorded in the proper clerk's office, and that "thereupon, and on the payment or deposit by the company of the sums to be paid as compensation for the land, the company shall be entitled to enter upon, take possession of and use the said land for the purpose of its incorporation during the continuance of its corporate existence ; and all persons made parties to the proceedings shall be divested and barred of all right, estate and interest in such real estate during the corporate existence of the company. It is also provided in this law, that, if the making of this order be delayed more than thirty days from the date of the presenting of the petition for the assessment of damages, "the company shall be entitled to enter on the possession of the land, provided such bonds as the court may require for the payment of the award of the commissioners shall first be filed ;" and also, that if "after an attempt to acquire title by appraisal or otherwise, it is found that the title thereby attempted to be acquired is defective," the company may proceed anew to acquire the title, and at any stage of such new proceeding the court "may authorize the corporation, if in possession, to continue in possession, and if not in possession to take possession, and use such real estate during the pendency and until the final conclusion of such new proceeding, and may stay all actions against the company on account thereof on such company paying into court a sufficient sum, or giving security, as the court may direct, to pay the compensation therefor when finally ascertained."

These, it is believed, are all the provisions of law applicable to the case. The facts may be stated in a few words : The suit is for alleged trespasses committed by the defendants in constructing the Pacific Railroad upon the plaintiff's ground before the company had commenced proceedings against the plaintiff to acquire title to it, although afterwards and before the present suit was commenced they did insti-

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tute such proceedings, and so conducted them that during the progress of this suit a judgment was rendered against the company for the assessed damages, and an order was made vesting the title to the land in the company. In the course of the present suit the defendants amended their answer, alleging the institution of these proceedings to acquire title, and that they were yet pending and being prosecuted by the company with reasonable diligence to a termination. The court refused to strike out this amended answer, admitted these proceedings in evidence on the trial, and directed the jury substantially that if the company had located their road on the plaintiff's land, and the trespasses complained of were necessarily committed by the company's contractors in the construction of the road, the plaintiff could not recover on account of such acts.

It is thus seen that the practical question in the case is, whether the legislative acts, to which we have referred, any or all of them, justify the alleged trespasses, and we are of opinion that they do not; and that, therefore, the judgment must be reversed and the cause remanded, and in this we all concur.

Supposing the provisions of the general railroad law on this subject to be applicable to all railroad companies, there is no pretence that the company had any authority, under the provisions of that law, upon the facts of their case, to enter on the plaintiff's land for the purpose of constructing the road. That act is very cautiously worded for the protection of private property; and while it confers authority upon railroad companies to enter upon the land of others for the purpose of making the preliminary examinations and surveys, the power to enter for the purpose of construction is withheld *until the damages are paid*, except in two classes of cases, when, owing to the occurrence of events out of the usual course of things, the companies are allowed to enter for construction temporarily during the pendency of the proceedings for the assessment of the damages, upon depositing in court a sum sufficient to meet the damages to be assessed,

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or upon giving sufficient bonds for the damages. This company, however, have by their original charter, as we have already observed, a general authority "to survey, mark, locate and construct" their road; and if the view taken at an early time by some judges, that the authority given by the legislature to take private property is valid although no provision be made for ascertaining and paying the owner the required compensation, be correct, the authority here given to construct the road is a sufficient answer to the alleged trespass. This opinion was advanced by Chancellor Kent, in Rodgers against Bradshaw, 20 Johns. 945, when he remarked, that "it would deserve very grave consideration before we undertook to lay down the broad proposition that, notwithstanding a statute clearly and expressly directed the assumption of private property for a necessary public object, it would still be a nullity, and the officer who undertook to execute it a trespasser, if a provision for compensation did not constitute part and parcel of the act itself." It was, however, afterwards seen that if this view of the constitutional provision for the protection of private property against the abuse of the right of eminent domain were to prevail, the provision would be nothing more than a mere moral rule that the legislature might disregard with impunity so far as the legal rights of owners were concerned, and that private property was, in this particular, left in our government where it was in the civilized governments of Europe, under the protection of the moral sense of the legislative department. It was evident too that there was no principle on which any middle course could be taken, such as had been suggested of protecting the party by injunction against the act of the officer; for if the law were constitutional, the taking of the property was lawful and could not be restrained by the courts; and if it were unconstitutional, it was void, and the supposed authority that it conferred was a nullity, and no answer to the trespass. And, accordingly, it is now settled by the more modern decisions, that *legislative acts which direct private property to be taken for public use must provide the owner*

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with a proper remedy to obtain compensation, or they will be disregarded by the courts as inconsistent with the constitution. (Bloodgood v. M. & H. R. R. Company, 18 Wend. 1; City of Pittsburgh v. Scott, 1 Penn. State, 300; Cullender v. Marsh, 1 Pick. 430.)

This being settled, the question then was, whether the payment of the compensation must precede, or at least be concurrent in point of time with the taking of the property; or whether it was sufficient if provision were made in the law for the ultimate payment of it. And, in order to remove all doubt on this point, some of the more recent American constitutions have expressly provided that the payment shall precede the taking. The Mississippi constitution prohibits the taking of private property "without just compensation *first* made;" and such, too, is the language of the New Jersey constitution of 1844; and in a Mississippi case (Thompson v. Grand Gulf R. R. Company, 3, How. 24)—where the provision to enable the company to acquire the title to land directed the court, after the assessment of the damages, to convey the title to the company, and at the same time to give judgment and execution against them in favor of the owner for these damages—it was decided that this judgment and execution was not compensation within the meaning of the constitution, and that the provision to transfer the title was unconstitutional and void. The provision of the civil code of Louisiana, (Art. 489,) is, that no one can be deprived of his property except "in consideration of a *previous* and equitable indemnity;" and the civil law of France (Art. 545) is to the same effect, that no one can be compelled to give up his property to the public except "for a just and *previous* indemnity." The language of our own constitution, which it is believed is the language in which this principle is generally expressed in the American constitutions, is that private property can not be taken "without just compensation;" and it is argued, by those who maintain that an individual ought not to be deprived of his property *without at the same time receiving the equivalent for it*, that our provision,

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although not in the very same words with the provisions we have quoted, is of the very same import, and does not admit of a different meaning even if we limit ourselves to a grammatical interpretation of it ; that the just compensation or indemnity mentioned in all these provisions is the *equivalent* to be paid to the party for the property that is taken from him and not the promise of one ; that the right of eminent domain, as exercised in all civilized nations, is nothing other than a power in the state of compelling individuals to submit in proper cases to a *sale* of their property for its just value, and that the effect of this power, when exerted, is a forced sale at the assessed price ; (1 Domat, book 1, Tit. 2, sec. 13;) that the price to be paid is of the essence of a sale, so that the buyer does not become the owner of the thing bought but by the payment of the price, unless the seller agree to accept some other security in lieu of it ; and that there is no reason, in ordinary cases not calling for an exception to the general rule, why an individual should be compelled to part with his property to the public on credit ; and that to allow this is against the whole spirit and scope of the provision, and a withholding from private property that just protection to which it is fairly entitled. In the earlier days of our state governments, private property, when taken for the public use, was taken mainly by the state, or its political subdivisions, counties, cities, &c., for canals, roads, streets, &c., and the compensation, of course, was paid by these public bodies ; and the laws passed for this purpose usually directed the property to be taken whenever it was needed, and applied at once to the public service, and provided, at the same time, for the immediate assessment and payment of the damages by a warrant drawn by a public officer upon the proper treasury in the usual manner of making public payments. These of course were, to every practical purpose, cash sales, and were held valid by the courts, although the law authorized the taking before the actual payment of the money to the party ; and in this manner and to this extent, at least, it became the doctrine of several of

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the state courts that the payment of the compensation need not precede or be simultaneous with the taking. (Smith v. Helmer, 7 Barb. 426; Rubottom v. McClure, 5 Blackf. 505; Bloodgood v. M. & H. R. R. Com. 18 Wend. 17.)

The present case, however, does not require us to determine this question even in reference to a private corporation. It is enough here that the law must provide the owner with the means of obtaining compensation; otherwise, it is admitted on all sides to be unconstitutional. These, of course, must be efficient means—*an adequate fund and an appropriate legal remedy to enforce its application*; and we think a judgment against a private corporation, that may or may not be paid, is not sufficient. The great works of internal improvement have more recently been undertaken by private corporations, which of course are allowed to take the land of individuals necessary for their purposes, and are charged with the payment of the compensation; and the laws passed for this purpose have generally followed the old forms observed when the state or its municipal corporations were to pay, directing an order to pay to be made against the company; and, as the provision was deemed sufficient to justify the state and these municipal bodies in taking possession of the property, it is now argued that it ought to be allowed to have the same effect when applied to private corporations; but it is to be observed that there is a moral certainty as to the payment in the one case that does not exist in the other. Private corporations do not possess an inexhaustible fund for the payment of their liabilities such as municipal bodies possess in the persons and things within their jurisdiction subject to taxation, and they of course may fail and prove unable to pay their debts; and this is a sufficient reason why, what has been allowed in favor of the state and its political subdivisions should not be extended to private corporations. We are accordingly of opinion that this company had no lawful authority under their charter to enter upon the plaintiff's land for the purpose of constructing their road until they had acquired the title, and that the passing of the order for

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the payment of the money and the transfer of the title did not vest the title in them without the actual payment of the damages.

We are not to be understood, however, as denying to the legislature the power of authorizing an entry upon private property without compensation for the purpose of making the preliminary examinations and surveys before the location of the road. Similar exertions of the sovereign power of the state for the promotion of the common good are matters of almost daily necessity and occurrence, and although in all of them there is a momentary interference with the rights of the owner, it is acquiesced in without any complaint or indeed any question as to the right. The entry of any officer charged with the execution of criminal process upon the land of a third person for the purpose of making the arrest, and the entry of commissioners to view and mark out a public highway upon the land of another for the purpose of executing the public duty imposed on them, may be mentioned as cases of this character. But in these cases there is no exercise of right of eminent domain, no permanent appropriation of the property to the exclusive use of another within the spirit of this constitutional provision, and they are all subject to this limitation, that they are reasonably necessary to accomplish a lawful purpose, are but temporary in their character, and are accompanied with no unnecessary damage.

But that is not the present case. Here the company took exclusive and permanent possession of the real estate of the plaintiff by constructing their road upon it, and whether the owner was thereby divested of the formal title to his property or not, he was substantially deprived of the use and enjoyment of it ; and this is clearly such a taking as the legislature can not authorize without providing for the owner a just compensation. Our own legislature have recognized this distinction between an entry for the preliminary examinations and an entry for construction in their general railroad law—allowing the former without compensation but subject to responsibility for any real damage that may be occasioned

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thereby, and withholding the latter until the title is acquired in the manner prescribed for that purpose.

The doctrine that we now apply to this case seems to be the doctrine in New York as settled by the highest court of that state in Bloodgood's case before referred to, but we are aware that a somewhat different doctrine prevails in some of the New England states. In the state of Maine, the damages are assessed upon the application of the owner at any time within three years after the taking of the property, and an order for their payment is made against the party after the manner of the proceedings when the ground is taken for a common highway ; and in Cushman v. Smith, 34 Maine, 365, it was decided that this provision was sufficient to justify the company in taking possession for the purpose of construction, but that, if they failed to pay the damages within a reasonable time after their assessment, the statute authority would be treated as a nullity from the beginning, and those who entered under it would be chargeable as trespassers. The struggle with the courts seems to be to reconcile the claims of convenience with the requirements of justice, by allowing the company to take possession of the land as soon as it is selected, without waiting for the assessment of the damages, and at the same time securing to the owner the price of his property, without the payment of which it is felt that he can not be lawfully deprived of it. Our own legislature have reconciled these conflicting claims, wisely enough perhaps, in their general law, by requiring the damages to be paid under ordinary circumstances before the company can enter for the purpose of constructing their road, but at the same time allowing such possession to be taken temporarily, during the pendency of the proceedings to acquire the title—in case these proceedings are delayed beyond a reasonable time—upon a deposit by the company of money or bonds sufficient to meet the damages when assessed. We remark here, in conclusion, that all the cases in all the books seem to assume that an individual can not be *absolutely deprived* of his property without the *actual payment* of the assessed

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price, even though a proper provision for its payment be made in the act authorizing the taking of it; and perhaps it would be better to hold that, even in the cases where the proper provision is made for the payment of the price, so that the property is allowed to pass, it passes subject to the condition that the price shall be subsequently paid, so that if for any cause it be not paid the party may repossess himself of it on account of the condition broken.

Other questions have been discussed in this case—some of which are settled by the decision in *Newby v. Platte county*, made at the present term—but what we have here said disposes of the case, and is all that is required of us at present.

All of us concur in reversing the judgment and remanding the cause, and judgment will be entered accordingly.

THE STATE, Appellant, v. SLOSS, Respondent.

1. The pardoning power belongs exclusively to the executive department of the government and can not be exercised by the legislative department.
2. The "act to relieve certain persons from the penalties of an act entitled 'an act to regulate dram-shops,' approved December 18, 1855, (R. C. 1855, p. 682)," approved February 12, 1857, (Sess. Acts, 1857, p. 60,) releasing all persons, then indicted for violations of the said act to regulate dram-shops committed before December 15, 1856, from prosecution, provided each individual shall pay all the costs and a fee of two dollars to the circuit attorney—and declaring that whenever any person so indicted shall pay said costs and fee, it shall be the duty of the circuit judge to order said case to be dismissed—is unconstitutional, it being an attempted exercise of the pardoning power, and also an interference with the judicial department of the government.*

* The following is the act declared unconstitutional:
"An act to relieve certain persons from the penalties of an act entitled 'An act to regulate dram-shops,' approved December 18, 1855.

"Whereas, it was lawful for any person to sell ardent spirits in any quantity not less than one quart before the approval of said act; and whereas said act never was published; and whereas the statute containing said law making it an offence to sell less than one gallon was not distributed until about the 15th of December, 1856; now therefore,

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The facts are sufficiently set forth in the opinion of the court.

Ewing, (attorney general,) for the State.

The act of December 13, 1855, under which the indictment was found, took effect 1st May, 1856. The act of 1857 does not repeal or modify the law of 1855, but releases defendant from a pending prosecution for an offence against that law, upon the performance of certain conditions. It is an act of legislative pardon. The conditions annexed do not make it less an act of pardon, and the performance of such conditions by defendant can not give validity to the act. The pardoning power is vested in the governor by the constitution, and it is an exclusive power in that officer. The act in question blends the powers of the legislative and judicial departments of the government; is an interference by the former with the administration of criminal justice, and therefore unconstitutional. (Art. 2 Constitution ; State v. Fleming et al. 7 Humph. 152.) The act authorizes the criminal judge to dismiss the prosecutions. An expression of the will of the law-making power, that defendant and others against whom indictments were pending at the time be released from such prosecutions, is not to enact a law; it is an order, a judgment, a decree.

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"§ 1. That all persons in the state of Missouri, who are now indicted for a violation of said law committed before the 15th of December, 1856, be and they are hereby released from said prosecution; provided each individual shall pay all costs in said case and a fee of two dollars to the circuit attorney.

"§ 2. *And be it further enacted*, That whenever any person who is indicted as aforesaid shall pay cost and fee as aforesaid to the circuit attorney, that it shall be the duty of the circuit judge to order said case to be dismissed.

"§ 3. *And be it further enacted*, That any person, indicted as aforesaid, not complying with this statute, shall be prosecuted as is now provided by law.

"§ 4. That nothing in this act contained shall apply to any case where the offence was committed after the 15th of December, 1856.

"§ 5. This act shall take effect and be in force from and after its passage.

"Approved February 12, 1857."

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Johnson, for respondent.

The Circuit Court did right in dismissing this case according to the terms and provisions of the act of the general assembly, approved 12th February, 1857. The act of the general assembly above referred to merely changes the penalty from a fine of twenty dollars, upon trial and conviction, to the costs incurred, and a fee of two dollars to the circuit attorney—a change of punishment, nothing more—a power which has been exercised by the legislature without question from the earliest period of the state government and acquiesced in by all the departments of government up to the present time. See the various bills passed to relieve sheriffs and other officers from penalties incurred—much stronger cases than the one at bar.

SCOTT, Judge, delivered the opinion of the court.

In 1857 the general assembly passed an act to the purport that all persons in the state of Missouri, who are now indicted for the violation of the act to regulate dram-shops committed before the 15th December, 1856, be and they are hereby released from said prosecution; provided each individual shall pay all the costs in said case, and a fee of two dollars to the circuit attorney.

The defendant was one of the individuals embraced within the purview of this act, and produced to the court satisfactory evidence that he had complied with the conditions of its proviso, and thereupon, upon his motion, the court dismissed the cause and entered judgment for the defendant. To this action of the court below the State excepted and took an appeal to this court.

The powers of the general assembly are not unlimited. All the departments of our government are confined in their operations. They have prescribed limits, which they can not transcend. The union of the legislative, executive and judicial functions of government in the same body, as shown by experience, had been productive of such injustice, cruelty and

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oppression that the framers of our constitution, as a safeguard against those evils, ordained that the powers of government should be divided into three distinct departments, and that no person charged with the exercise of powers properly belonging to one of these departments should exercise any powers properly belonging to either of the others, except in the instances expressly directed or permitted by the constitution.

Although questions have sometimes arisen whether a power properly belonged to one department of government or another, yet there is no contrariety of opinion as to the department of the government to which the power of pardoning offences properly appertains. All unite in pronouncing it an executive function. So the framers of our constitution thought, and accordingly vested the power of pardoning in the chief executive officer of the state.

There can be no question as to the nature of the act under consideration. It is as effectually a pardon as though it were one in form under the great seal of the state. Its being clothed with the forms of legislation can not vary its nature and effect. If such laws are warranted by the constitution, it is plain that the power of granting pardons is as fully in the general assembly as though it had been in express terms conferred on that body. The exercise of power involved in the passage of the act under consideration is not to be likened to that exerted in passing laws releasing sheriffs, collectors and others from forfeitures incurred for failing to collect and pay over the public money. The existence of such a power is incident to the relation of creditor and debtor and to the authority to pass laws for the management of the public revenue. The operation of the act under consideration is confined entirely to the release of individuals from prosecution who stand indicted for offences. That is its sole object. The justice or propriety of the act of pardon has nothing to do with the question of its constitutionality. We are not to presume that the governor, under suitable circumstances, will not exercise the power with which he has been clothed by the

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constitution. He is the sole judge of the propriety of granting a pardon. The conditions prescribed in order to obtain the benefit of a release under the act do not the less make it a legislative pardon; they only change it from an absolute into a conditional pardon.

The time at which the act was passed renders it obnoxious to the objection that it interferes with the judicial department. The act, before trial and conviction, directs the disposition that shall be made of the cause. Where is the warrant in the constitution for the general assembly to direct what disposition shall be made of causes depending in the courts? Is not the exercise of such a power a judicial function? The governor can pardon both before and after conviction. His pardon before conviction being pleaded would be a defence to the accusation. Here is a prosecution depending in court and the legislature comes in and orders the party to be released from it. What is that in effect but entering a judgment of acquittal?

In the case of the State v. Fleming, 7 Humph. 152, a law very similar in its effects to that under consideration was examined, and the court did not doubt but that it was unconstitutional. Judgment reversed, and cause remanded; Judge Ryland concurring; Judge Leonard absent.

DARNEAL, *et al.*, Appellants, v. REEVES' EXEC'R, Respondent.

1. The probate court of Ray county has jurisdiction to entertain a motion for an order directing an executor to pay specific legacies. (Sess. Acts, 1853, p. 390.)

Appeal from Lafayette Circuit Court.

The facts sufficiently appear in the opinion of the court.

Napton, for appellants.

The probate court of Ray had jurisdiction to determine this motion. (R. C. 1845, tit. Administration, art. 6, secs. 1, 3; tit. Courts; *Evain v. Henry*, 5 Mo. 469.)

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Morrow and Ewing, for respondent.

The motion to dismiss was properly sustained by the Circuit Court, because the probate court had no jurisdiction of the matter and proceedings of plaintiffs. The court had no power upon a mere *motion* to determine the rights of the parties to the property in controversy. If it had jurisdiction of the subject matter at all, it could only have been acquired and exercised upon a petition or bill alleging a cause of action, and by notice to the adverse party, as in a regular suit. The motion was filed and proceedings commenced at an adjourned term of the probate court, and without notice to defendant. The proceedings involved the question of the *right of property* in the notes and evidences of debt in controversy. The notes, &c., claimed were not described in the will, and the question of *ownership* could only have been determined by proper pleadings and issues, and not upon a mere motion. No title to the property could pass without the assent of the executor, even though it were described in the bequest in said will, and no assent of the executor to the claim of plaintiff was shown in said motion, and without such assent the probate court had no power to make the order prayed for in plaintiff's motion. (Toller's Exec'r's, 306; 2 Williams' Exec'r's, 981; 1 Carter, 570; 6 Pick. 125; Roper on Leg. 841.) The power to order the payment of legacies upon settlements of executors does not include the power to determine upon a motion whether the property claimed by a legatee is or is not a legacy; nor has the probate court the right to order payment of a legacy specifically described in the will without the executor's assent. (R. C. 1845, p. 100, secs. 1, 2, 3.) As to the jurisdiction of the probate court of Ray county and the mode of exercising it, see the act establishing probate court in Linn county. (Sess. Acts, 1853, p. 390.)

RYLAND, Judge, delivered the opinion of the court.

In 1853 the legislature of the state of Missouri created probate courts for the counties of Linn, Harrison, Ray, and

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Wright, each. The act creating these courts was approved February 3d, 1853, and was to take effect and be in force from its passage. (Sess. Acts, 1853, p. 390.) By this act, the probate court has exclusive original jurisdiction in all cases relative to the probate of last wills and testaments; the granting letters testamentary and of administration, and of repealing and revoking the same; appointing and displacing guardians and curators of orphans, minors and persons of unsound mind; in binding out apprentices, and in the settlements and allowance of accounts of executors, administrators, guardians and curators; to hear and determine all disputes and controversies whatsoever respecting wills, right of executorship, administrators and guardians; all controversies between masters and their apprentices; and to hear and decide all controversies about distribution of assets; to hear and determine all demands against executors, administrators, guardians and curators, *when the demand does not exceed two hundred dollars*. The probate court has concurrent jurisdiction with the Circuit Court in all demands at law against estates when the demands exceed in amount two hundred dollars. The act declares that the probate judge shall have concurrent jurisdiction *in equity* with the Circuit Court in all matters and controversies properly cognizable in courts of equity in this state, according to the rules of practice which govern courts of chancery, as are prescribed by law, and in which executors, administrators, guardians and curators are necessarily parties complainant or defendant; provided that said judge of probate shall not have jurisdiction, in any case whatever, to entertain or decide upon any controversy in which may be involved the title to land or other real estate, or the right of possession to the same or any interest therein, or right in any way arising therefrom, or any proceeding to effect a partition of land, tenements or assignments of dowers therein; and for such services shall be allowed the same fees that are allowed to the clerks of the circuit courts in chancery cases. (See art. 4, sec. 4 of said act.) In all cases before the judge of probate, either party

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may require a jury to try the same. The probate judge is required to conform to and be governed by the rules of practice prevailing in the circuit courts of this state. The probate court is declared to be a court of record. The probate judge has power to issue all original process which may be necessary and proper in any matter or subject over which he may have jurisdiction ; and all process necessary to enforce the orders of judgments of the said court.

Such was the law governing the probate court of Ray county, and such the power and jurisdiction of this court, when the petitioners, Jacob Darneal, Winnifred Darneal, and Joseph S. Hughes, trustees, filed their motion in the probate court of Ray to procure an order of the court for the payment of certain specific legacies bequeathed by Thomas Reeves in his last will and testament to Winnifred Reeves, now Winnifred Darneal. Columbus Reeves, the executor of Thomas Reeves, deceased, appeared in the court and moved to dismiss the motion of the Darneals and Hughes, because "the probate court has no jurisdiction in the premises ; it has no jurisdiction of the subject matter of said motion and proceedings, nor of the person of said defendant therein ; and has no power or right whatever to take cognizance of or hear and determine the same." Many causes are set forth by the executor against the allowance of the plaintiff's motion ; but the principal reasons are want of jurisdiction in probate court to make the order prayed for. The court, however, made the order directing the executor to pay over the specific legacies mentioned in the will of Joseph S. Hughes, trustee for Winnifred Darneal, late Winnifred Reeves. The executor prayed for and obtained an appeal from the order, requiring him to pay over to Mrs. Darneal's trustee the specific legacies, to the Circuit Court of Ray county. On the petition of the defendant the venue in this case was changed from Ray Circuit Court to the Circuit Court of Lafayette county ; and at the November term of the Circuit Court of Lafayette county, in the year 1856, the court dismissed the motion and proceedings originally commenced in the probate court of

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Ray county, because said probate court had no jurisdiction of the subject matter. The plaintiffs excepted to this ruling of the Lafayette Circuit Court, and prayed for an appeal, which was granted them, and they bring the case here by appeal.

The only point in this case is in regard to the jurisdiction of the probate court of Ray county. From the act establishing the probate court, we can not see how this question ever could be seriously raised. There is, it seems to us, no ground to doubt the jurisdiction of the probate court of Ray county over the subject matter of the plaintiff's motion. This probate court is expressly authorized and empowered to take cognizance of cases like the plaintiff's. It has concurrent jurisdiction, both as a court of law and equity, with the Circuit Court over all matters and subjects in which executors, administrators, guardians and curators are necessarily parties, either as complainants or defendants, except cases involving matters relating to the realty. The jurisdiction over the subject matter in this case—legacies of promissory notes, personalty only—can not be doubted ; and it was error in the Circuit Court to dismiss this proceeding. If the legacy be so uncertain as that it can not be enforced, still that does not take away the jurisdiction of the probate court over the subject. Here, in the case before us, nothing is decided but that the motion made by the plaintiffs in the probate court must be dismissed because that court had no jurisdiction. This, we say, was against the law ; it was error for the Circuit Court of Lafayette to order the motion to be dismissed. It was the duty of said court to have proceeded and have settled the matter in controversy between these parties, and not to have dismissed the motion. Whenever it appears upon settlement made by the executor that there is sufficient money to satisfy all demands against an estate, there is nothing to hinder the probate court to make an order on the executor to pay over legacies, taking care to have specific legacies first paid.

We would not be understood as deciding any thing in re-

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lation to the bequest of the testator to his wife Winnifred under the will in this suit. All that we decide has reference alone to the jurisdiction of the probate court over the subject matter of the plaintiff's motion. The judgment is reversed and the cause remanded for further proceedings; Judge Scott concurring.

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THE STATE, Defendant in Error, v. SUTTON, Plaintiff in Error.

1. An indictment charging a sale by defendant of intoxicating liquors "without his then and there having a dram-shop keeper's license, inn-keeper's license, or any other legal authority to sell said intoxicating liquor at said place, in manner and form aforesaid, contrary," &c., sufficiently charges a want of authority to sell.

Error to Newton Circuit Court.

Ewing, (attorney general,) for the State.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted for selling intoxicating liquor without license at a race track in Newton county. The indictment was found at the October term of the Circuit Court for Newton county, in the year 1855. The defendant appeared to the indictment, and moved to quash it, because it does not sufficiently deny legal authority in defendant to sell the liquor as charged in the indictment. The court overruled this motion; the defendant saved his point and tendered his bill of exceptions. Afterwards the defendant pleaded not guilty to the indictment, and was fined by the court twenty dollars. The record shows no motion in arrest of judgment. The defendant brings the case here by writ of error, and fails to appear in this court. This court however looks into the record in criminal cases without having errors assigned. We have done so in this case, and find the indictment sufficient, and therefore must affirm the judgment. The

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indictment charges the selling of the intoxicating liquor by the defendant, and then makes the averment, "without his then and there having a dram-shop keeper's license, inn-keeper's license, or any other legal authority to sell said intoxicating liquor at said place, in manner and form aforesaid, contrary," &c. We think the authority to sell is here sufficiently negatived, and that the court ruled properly in overruling defendant's motion to quash.

The court is not bound to quash indictments on motion *ex debito justicie*; and we have again and again condemned the practice of quashing indictments unless they be clearly bad. This defendant then, after his plea, should have moved in arrest of judgment, if he desired to raise the question again upon the sufficiency of the indictment. Notwithstanding, we have for his benefit looked into the record and found the indictment good. The judgment will therefore be affirmed; Judge Scott concurring.

BEALE'S ADMINISTRATOR, Respondent, v. DALE, Appellant.

1. Where a father sends home with his married daughter a slave, saying at the time that he had given the slave to her, it will not be presumed, as a matter of law, to be an absolute gift.
2. In an action for the possession of a slave, in which the value of the slave was alleged to be nine hundred dollars, and the damages for the detention one hundred dollars, the jury did not find the value of the slave, but "assessed the *damages* at eight hundred dollars." *Quere:* whether a judgment for such sum could be supported?

Appeal from St. Clair Circuit Court.

F. P. Wright, for appellant.

I. A new trial should have been granted on account of the verdict. The verdict was bad. It only finds part of what was in issue. The issues were, whether the slave belonged to plaintiff as averred; and if so, what was her value, and what the damages arising from the detention, if wrongfully

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detained. The jury failed to find the value, and this omission is fatal. (1 Chit. Plead. 141; 7 Bacon Abr. Verdict. m.) The damages were too large—being assessed at eight hundred dollars, and the amount claimed being only one hundred.

II. The first and second instructions given on the part of the plaintiff are wrong; the first is absolute, without reference to the disputed fact whether the slave was given to the wife for her separate use or not; and if it was, the instruction is wrong. The second is a comment on the evidence, and also states that as a presumption of law which should have been found by the jury. The instructions asked by defendant should have been given. If the facts were as supposed in defendant's instructions, the administrator of Beale's estate could not recover in *any form of action*.

III. The judgment should have been arrested; it neither conforms to the relief sought nor to the verdict. The petition sought the recovery of the slave, and the judgment should have been for such recovery; or rather the judgment should have been in the alternative, that the plaintiff recover the negro girl, or the value thereof if he can not have the negro girl, and damages for the detention. (1 Chit. Plead. 141.) But judgment should not have been rendered for greater damages than claimed in the petition. The jury having failed to find the issues, the court would reverse the judgment, even if no motion in arrest had been filed. (3 Mo. 275; 5 Mo. 53; 9 Mo. 624.)

Johnson and Gardenhire, for respondent.

I. Both parties concede there was a gift; respondent insisting it was absolute, and vested the slave in Beale, the decedent; and appellant, that it was conditional, and vested the slave in decedent's wife during life, and in her children afterwards. This was a question of fact submitted to the jury under instructions every way unobjectionable, and they found it for the plaintiff.

II. But it is insisted in this court that the verdict was for greater damages than asked in the petition, and that the jury

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did not assess the value of the slave. Neither of these objections appears in the motion for a new trial. If valid, they were certainly sufficient grounds for a new trial, and the attention of the court below ought to have been called to them in the motion for a new trial. It was not done. There is nothing at all in the record to show that either of these objections ever was presented to, or thought of in, or decided by, the court below. This court only reviews such points as the record shows were presented to and decided by the court below. It is a court of review.

III. It can not be insisted that these objections were presented to and decided by the court in the motion in arrest of judgment, and the decision of the court upon it. A motion in arrest is an attack upon the petition, as a motion for a new trial is an attack upon the verdict. There is no defect in the petition ; the defect, if any, was in the verdict, and it was not pointed out to the court in the motion for a new trial. The judgment conforms to the verdict, and the verdict is such a one as will support the judgment ; and, although the verdict might have been attacked successfully in the motion for a new trial, yet it was not so done, and it must stand, and standing supports the judgment.

RYLAND, Judge, delivered the opinion of the court.

This is an action, instituted in the Circuit Court of St. Clair county by Metcalf as the administrator de bonis non of the estate of James Beale, deceased, against Dale, in the nature of an action of detinue for the recovery of the possession of a negro girl slave.

The plaintiff alleges that Beale died the owner of the slave ; that he, by virtue of his letters of administration, became the legal owner of the slave, and as such was entitled to the possession ; that defendant wrongfully detains the negro girl ; that the slave is of the value of nine hundred dollars, and that the damages sustained in consequence of the detention amount to one hundred dollars. Plaintiff asks

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judgment for the immediate possession of the negro girl slave, and for the damages for the detention. The defendant answered, denying the averments in the petition, and claims the negro as his own property.

It appears from the evidence set forth in the bill of exceptions that the wife of the decedent Beale, (who is now the wife of the plaintiff,) is the daughter of the defendant Dale. The negro girl in controversy was owned and raised by Dale. The evidence respecting the ownership of the slave at the time of the commencement of this suit consisted principally of the declarations of the defendant and of the deceased Beale. The plaintiff endeavored to prove that defendant gave the slave absolutely to his daughter in the lifetime of Beale. The defendant endeavored to prove that he gave the negro to his daughter during her life, and after her death to her children, but not to take effect until the death of defendant's wife. The evidence shows that nothing was said by defendant about giving the negro until some time during the last sickness of Beale. His daughter was then mother of several children by Beale. The jury found "the issues for the plaintiff, and assessed the damages at eight hundred dollars." The judgment is as follows: "It is therefore considered by the court that the said plaintiff have and recover of the said defendant the said sum of eight hundred dollars so assessed by the jury as aforesaid, together with his costs and charges in this behalf expended, and that execution issue therefor." As the court gave an improper instruction on the part of the plaintiff, and the judgment will in consequence have to be reversed, we have considered it most prudent not to give any intimation about the evidence. We shall therefore not make any statement of it particularly.

The law allows a person to make a parol or verbal gift of a slave, provided possession accompany the gift. The donor can not give and retain the possession verbally, but may give verbally and without writing if he give possession of the property to the donee at the time or shortly after, so that there be a transfer of the property and possession from the

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donor to the donee, *bona fide*, changing the property and possession, divesting the same from one and investing it in the other. The law allows a person to give by parol a slave to his daughter for life, and at her death to her children, especially if she have children living at the time of the gift, and the possession accompany the gift. In such case the delivery of possession to the mother, the tenant for life, was a delivery *pro hac vice* to her children. This doctrine is plainly laid down by this court in *Pemberton v. Pemberton*, 22 Mo. 338. The court, in delivering the opinion, asked the question, "Was it in the power of the donor to make this gift to his daughter for life, and then to become the property of her children ? The children in this case were alive at the time the donation was made to their mother for life, and to them after her death. This donation gave the mother a life estate and a vested remainder to her children ; the delivery of the possession to the mother, the tenant for life, was a delivery *pro hac vice* to her children." The court also said in this case of *Pemberton v. Pemberton* : "Here is nothing but a simple donation of property to persons in being —the one to have it for life, and the others to have it after the first taker's death ; and where, in such gifts, the possession accompanies the property in the hands of the donees, there can not be a reasonable objection to their validity."

This case can only be viewed in one of three ways as regards the transaction between the defendant Dale and his daughter, Mrs. Beale. 1st. If the gift of the slave in question was made to the daughter absolutely, and was accompanied with the possession. 2d. If the gift was to her for her life, and her children after her death. 3d. If the gift was to be made and to take effect after the death of the defendant's wife—to be a future gift.

It is only in the event that the first proposition can be established by the testimony, that the plaintiff can be allowed to recover the slave or her full value. If either the second or third be the real state of the transaction, he can not recover the slave or her full value. If it be the third, he can not re-

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cover any thing, for it is no gift. If the second, he as administrator is entitled only to the life-estate of the wife, and not the full value of the slave. The instructions therefore should be so framed as to embrace the law arising on either of these views.

The second instruction given for the plaintiff is wrong; it was calculated to mislead the jury, and for giving this the judgment must be reversed. This instruction is as follows: "If the jury shall believe from the evidence that Nancy Beale, now wife of said plaintiff, is the daughter of defendant, and that defendant sent the slave Susan home with her, and that defendant at that time said that he had given Susan to her, without any other explanation of his intention whether it was an absolute gift to her or not, and that defendant permitted said slave to remain in her or her husband, James Beale's, possession until the death of the said Beale, it is to be presumed, unless disproved by other evidence, that the slave was given absolutely as an advancement to his said daughter Nancy Beale."

This doctrine of presumption that property sent home by a father with his daughter and son-in-law, upon their going to commence housekeeping first after their marriage, will be considered as an advancement to his daughter and son-in-law, has never been carried to the extent heretofore as it has been in this case. Here the facts show that Beale and his wife had four or five children; had in all probability been keeping house for years; that Beale was in very feeble health, and that the daughter was in need of assistance to save her from severe menial labor—even out-door labor. Now to hold that in such cases, a father sending a servant to his daughter and saying he had given her the servant, and his permitting the servant to remain with his son-in-law and daughter until the death of the son-in-law, "it is to be presumed, unless disproved by other evidence, that the slave was given absolutely as an advancement to the daughter," is supported by no authority that we can find, and is in our opinion unwarranted. In *Mulliken v. Greer*, this court said: "The circumstance

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of the slaves' being sent home with the daughter of the defendant and wife of the plaintiff, when she left her father's house soon after marriage to go to the house of the husband, most certainly does not amount to a gift or transfer of the title to the slaves, although they remained there about one year till the death of the plaintiff's wife. But the sending of the slaves at the time and suffering them to remain was strong evidence from which a jury might well presume a gift." Here the situation of the parties is regarded—soon after marriage—about to go to the husband's house—having just left the father's house.

The doctrine of such acts being evidence from which a jury might presume that the father made an advancement to his daughter of the slaves or property upon her leaving his house—her former home—and being about to commence with her husband housekeeping, shortly after marriage, is fully sustained by numerous decisions of the highest courts in some of our sister states. But in no case that we have seen has the doctrine been stretched so far as this instruction carries it. (Carter's Exec'r's v. Rutland, Hayw. 97; Moore's Adm'r v. Dawney, 3 Hen. & Munf. 127; Brashears v. Blasingame, 1 Nott & McCord, 223; Thompson v. Caldwell, 3 Littell, 137; Smith v. Montgomery's Adm'r, 5 Mon. 502; Bell v. Strother & Buchanan's Exec'r's, 3 McCord, 207; Oldron v. Powell, 7 Ala. 655.) This court has held the same doctrine. This instruction had a direct tendency to mislead the jury.

This suit is for the negro girl and for damages for detention of the girl, stated at one hundred dollars; yet the verdict is for eight hundred dollars damages, without saying any thing about the value of the girl. The plaintiff says he is entitled to the immediate possession of the girl slave, and for which he asks judgment, as well as for said damages sustained for said caption and detention. Here his prayer is for judgment delivering to him the girl—the specific property—and damages for detaining from his possession the girl for one hundred dollars. Now the verdict and judgment are

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silent as to the value of the girl and her possession, and alone sound in damages—\$800. Now for what is this amount given? For the value of the girl? It can not be for the damages only in detaining her from the plaintiff's possession, for he estimates these damages at one hundred dollars only. This matter is jumbled up without care or skill, and the court below should not have suffered it to remain so. If it were for the full value of the slave, and the jury should find that the gift was one to the wife of Beale for her life and her children afterwards, then the administrator of Beale's estate is not entitled to the full value of the slave, but to the value only of Mrs. Beale's life interest in her.

Again, the plaintiff had better be more particular next time; he should well pause and reflect whether, when he sues for a specific article in his petition, he can name the proper judgment in such a petition and take a judgment for damages only. If a person sued in *detinue* at common law, the judgment for the plaintiff was that he recover the specific article sued for, and if it could not be had then the value thereof—not the article or the value, giving plaintiff choice which he would take, but for the value if the article could not be had. (*Poler & Bentlet v. Hardymon & wife, Yelverton*, 71 b.; 7 Mass. 414.) “Judgments in *detinue* are always conditional when in favor of the plaintiff, to recover the thing sued for, or, if it can not be found, its equivalent in damages.” In New York it is said the action to recover the possession of personal property is one peculiar in its character and object. The code has given it in place of the former action of *replevin*, and its design is to subserve the same purpose. (*Chappel v. Skinner*, 6 How. Prac. R. 339.) The actions for injuries by force to property, and claims to recover the possession of personal property, are substantially different causes of action. These actions are what were formerly known by the respective names of *trespass de bonis asportatis* and *replevin*; and these actions, under the present as well as the former practice, are concurrent actions—the same state of facts sustaining the action in either form. It is the judg-

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ment demanded which determines to which class it belongs ; and where the complaint asks for damages and not for the possession or return of the property, the action comes within the class which was formerly denominated trespass, and not replevin ; and therefore the plaintiff, in such a case, is not entitled to the benefit of the proceedings provided by the chapter concerning claim and delivery of personal property to obtain the immediate delivery of the property. (Spalding v. Spalding, 1 Code Rep. 64 ; 3 How. 297, 377 ; N. Y. Code, 1852, 3d ed., p. 218.) If the plaintiff's action be detinue, he can not change it by a judgment for damages only. He must be held to the action and the relief given under it. When a man sues in detinue for the specific species of property—a horse for instance—the death of the horse before the defendant makes his plea or answer will most materially affect the plaintiff's action ; but not so if the suit was *trespass de bonis asportatis*. (See Polk's Adm'r v. Allen, 19 Mo. 468.)

I have thought it proper to make these suggestions for the benefit of the parties, if they think proper to have another trial. The new code of practice has had its effect upon lawyers and suitors, and sometimes it appears as though neither party was any the better or wiser on account of it. Let the judgment be reversed and the cause remanded for further proceedings ; Judge Scott concurring.

STEWART, Respondent, v. NELSON, Appellant.

1. Where a purchaser at a sheriff's sale practices any deceit or imposture, or is guilty of any trick or device, the object of which is to get the property at an under value, the sale may be set aside in favor of the defendant in the execution.

Appeal from Cooper Circuit Court.

The facts sufficiently appear in the opinion of the court. *Torbert, Gardenhire, Morrow and Parsons*, for appellant. *Adams and Hening*, for respondent.

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RYLAND, Judge, delivered the opinion of the court.

This was an action brought by Stewart against T. W. Nelson to set aside a sheriff's sale of real estate and to compel the defendant, who was the purchaser, to convey to him the title acquired by the sheriff's deed. The defendant answered the petition, and the cause was by the parties submitted to the court, who found the facts as follows: "That the plaintiff was indebted to the county of Cooper as stated in his petition; that he had given a mortgage to secure the debts as therein stated; that judgment had been rendered at the times and for the amounts mentioned in plaintiff's petition; that executions were issued upon the judgments, and that the property described in the plaintiff's petition was levied upon and sold under said executions as stated in the plaintiff's petition. The court also finds that the real estate sold consists of two distinct tenements, and that it was all sold together in one lump. There was no evidence however showing that the property would have sold for a better price if sold separate. The court further finds that at the time of the sale the plaintiff was in the state of California, and had no notice of the proceedings against him except by order of publication; that he had no knowledge or information of the sale until after it took place; and the court further finds that the defendant bid off the property in a lump at one bid; that no other bid was made. The court further finds that, prior to the sale, the justices of the county court of Cooper county—to-wit, Hazell Rice and Wade—made the arrangement with Joseph L. Stephens, who was the county attorney, to-wit, that he (Stephens) was to attend the sale and purchase the property, if it went at a price not exceeding fifteen hundred dollars, which they considered as about the amount, with costs, then due the county; that Stephens was to hold the property, if he bought, first, to secure the county of Cooper in the amount owing to the county, and suffer the plaintiff, on his return from California, if he returned in a reasonable time, to redeem the same by the payment of the

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amount, interest and costs due the county ; and that Stephens consented to act in the matter, to purchase the property and hold it on the terms aforesaid ; and that Stephens, on the day of sale, made an arrangement with the sheriff to let him know when the bidding would commence ; that said Stephens was in the court-house attending to business on the day of sale, and just before the bidding commenced the defendant came to Stephens and told him that he need not attend the sale, that he had made the same arrangement and would stand in his place. And the court further finds that immediately afterwards the property was offered by the sheriff; that in consequence of what defendant had told him Stephens did not attend the sale and run the property up to fifteen hundred dollars, or at least to the amount of the county debts, interest and costs, which was about that amount ; and the court finds that the property was worth from fifteen hundred to two thousand dollars at the time of the sale ; and the court further finds that the competition at said sale was prevented by the acts and conduct of the defendant, and that he obtained the property at an under value of about five hundred dollars less than it would have brought on that account. The court further finds that after the sale the defendant executed his notes to the county of Cooper for the amount of his bid instead of paying the money, and paid the amount of costs, leaving unpaid the balance of the debt to the county ; that Nelson, the defendant, caused execution to be issued on the balance of the debt, which was about four hundred dollars, and ordered the same to be levied on other property of the plaintiff; and that plaintiff paid off the balance of the debt and interest, and offered, as alleged in his petition, to pay the defendant's notes to the county, and what money he had paid ; also offered to pay all expenses he had been put to on account of repairs, taxes or any other expense he had been put to ; but the defendant would not suffer him to redeem said property, to cancel or set aside the sale, or to convey it to the plaintiff ; and the court finds that the defendant was not guilty of any of the other matters or charges

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alleged against him by the plaintiff in his petition." The court declared the law upon the facts found to be that the sheriff's sale ought to be set aside, and that Nelson ought to convey the property back to Stewart by quit claim deed on his (Stuart's) paying off Nelson's notes to the county and refunding to said Nelson all the money he paid at the time of the sale, and paying to said Nelson all amounts expended on account of said property since the purchase; judgment was rendered accordingly; and in order to ascertain the amounts Stewart will have to pay and the amount of rents recovered by Nelson since the sale, it is ordered that an account be taken by Isaac Lionberger, who is hereby appointed commissioner for that purpose, who shall take said account and report to the next term of the court; and upon the filing of said report the time will be fixed within which Stuart shall redeem by the payment, &c. Defendant moved to review the finding, and stated his objections thereto. His motion was overruled, and he appealed to this court.

In looking into the testimony, we think the court was warranted in finding the facts, and we also entertain no doubt that the finding supports the judgment. We agree with the doctrine laid down in the Supreme Court of Pennsylvania, that a purchaser at a sheriff's sale who practices any deceit or imposture, or who is guilty of any trick or device, the object of which is to get the property at or under value, thereby renders the title so acquired worthless in his hands. (*Abbey v. Dewey*, 25 Penn. 416; *Neale v. Hone*, 20 Mo. 296; *Wooton et al. v. Hinkle*, 20 Mo. 290.) It is an unpleasant task to comment on such conduct and apply the terms the law warrants in administering it in such cases. We dismiss the subject by stating that there is nothing on the record requiring the interference of this court with the judgment below. Judge Scott concurring, the judgment is affirmed.

Martin v. Almond.

MARTIN, Appellant, v. ALMOND et al., Respondents.

1. A deed was executed in the following form: "This indenture, made and entered into this, &c., by and between A. B. and C. D., of, &c., of the first part, and E. F., of, &c., of the second part, witnesseth, &c. In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day, &c. [Signed] G. H. (seal), I. J. (seal), attorneys for A. B. and C. D." Held, to be the deed of the principals, A. B. and C. D.

Appeal from Platte Circuit Court.

Wilson, for appellant.

Napton and Hall, for respondents.

- I. The deed is the deed of the principal, Hardin D. Martin. (*Townshend v. Corning*, 23 Wend. 436; 4 Hill, 353; *Wilburn v. Larkin*, 3 Blackf. 55; *Dening v. Bullett*, 1 Blackf. 55; 1 Amer. L. Cas. 428.)

Ryland, Judge, delivered the opinion of the court.

The only question in this case is, whether the deed from Hardin D. Martin and Eveline Martin his wife, to Green F. Martin, which was executed in the following manner, is the deed of the principals or not: "This indenture, made and entered into this second day of April, 1846, by and between Hardin D. Martin and Eveline Martin, of the county of Platte, and state of Missouri, of the first part, and Green F. Martin, of Jefferson county, and state of Missouri, of the second part, witnesseth," &c. The covenants in said deed are in these words: "The said parties of the first part, for their heirs, &c., covenant and agree," &c. The deed concludes as follows: "In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year above written. [Signed] Zadock Martin (seal), James B. Martin (seal), attorneys in part for Hardin D. Martin and Eveline Martin."

We have no hesitation in saying that, in our opinion, this deed is the deed of Hardin D. Martin and Eveline Martin;

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and its execution in the manner above set forth is sufficient to show that it is the deed not of the attorneys in fact, but of the principals. This deed purports on its face to be the deed of Hardin D. Martin and Eveline Martin; they are called parties of the first part; all the covenants are made by them under that description. The *in testimonium* embraces them by the same description. The signatures of the attorneys being put first makes no difference. They subscribe the deed for their principals; the deed is all the way through in the name of the principals as parties of the first part; and it matters not whose names are first subscribed, the agents' or the principals'.

Judge Story, in his treatise on agency, says: "The true and best mode in such cases undoubtedly is, to sign the name of the principal 'A. B.,' and to add 'by his attorney, C. D. ;' but it will be sufficient if the signature, in such cases, be 'for A. B.' (the principal), 'C. D.' (the agent); for, under such circumstances, the order of the words is not material as the deed purports on its face to be the deed of the principal, and the intention is to execute it in his name and as his deed. Indeed, in all cases where the instrument purports on its face to be intended to be the deed of the principal, and the mode of execution of it by the agent, however irregular and informal, is not repugnant to that purport, it would probably be construed to be the deed of the principal, especially where the *in testimonium* clause is that the principal has thereto affixed his seal." (Sto. Ag. § 153.) A bond which sets forth that A. B., as agent of C. D., legally appointed for the purpose, binds the said C. D. to make a title, &c., and which is executed as follows: "A. B. (seal), agent for C. D.," is the deed of C. D., provided the authority of A. B. be sufficient. C. D. is here alone bound for the performance of the covenants, and the bond is executed for him by his agent. (Dening v. Bullett, 1 Blackf. 242.) It is most advisable, however, when the principal alone is to be bound, to write the deed as if it were to be executed by the principal in person, without inserting the attorney's name at all as was done in

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this case now before us. In Wilks v. Back, 2 East, 144, Grose, J., said: "I accede to the doctrine in all the cases cited, that an attorney must execute his power in the name of the principal and not in his own name; but here it was so done; for where is the difference between signing J. B., by M. W., his attorney—which must be admitted to be good—and M. W., for J. B.? In either case the act of sealing and delivering is done in the name of the principal and by his authority; whether the attorney put his name first or last can not affect the validity of the act done." The execution of a bond thus: "For L. J. Larkin—George Crum (seal)," was held to be sufficient. (3 Blackf. 56; see 1 Amer. Lead. Cas. 429, *et seq.*; Combes' case, 9 Coke, 77-8, note *g.*) Provided the act be done in the name of the principal, there is no particular form of words required to be used; thus, if opposite the seal be written "For A. B." (the principal), "C. D." (the attorney), the execution is good.

We deem it useless to multiply authorities on this subject or to cite further examples. We are satisfied that the ruling of the court below, declaring the deed in this case to be the deed of Hardin D. Martin and Eveline Martin, was strictly conformable to authority, and as such the judgment below must be affirmed; Judge Scott concurring.

THE STATE, Respondent, v. APPLING, Appellant.

1. The utterance in public of words grossly obscene, in such a manner as to outrage decency and be injurious to public morals, though not an open and notorious act of public indecency within the statute, is a misdemeanor at common law and punishable as such.



Appeal from Laclede Circuit Court.

F. P. Wright, for appellant.

The indictment is bad. Merely using vulgar and obscene words is not indictable under the statute. To constitute the offence there must be some open and notorious act of public

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indecency. But if the mere use of language is sufficient, the indictment is still bad. Neither charge is sufficiently laid. Dameron v. The State, 8 Mo. 496.)

Ewing, (attorney general,) for the State.

I. The offence charged is within the intention and mischief of the statute, and a reasonable construction of the law embraces the offence charged within its provisions consistently with the rule that penal statutes are to be strictly construed. The intent of the legislature in the construction of penal statutes is not to be disregarded. (Smith's Commentaries, 840-3.) But if the offence charged is not indictable under the statute, it is at common law. (4 Black. Com. 64; 1 Russell on Crimes, 4, 5, 6; Wharton's Crim. Law, 805; Bell v. State, 1 Swan, 42; Gingham & Ligan v. State, 2 Yerg. 589; Commonwealth v. Sharpless, 2 Serg. & Raw. 91; Barker v. Commonwealth, 19 Penn. 412.)

RYLAND, Judge, delivered the opinion of the court.

The only question in this case is raised upon the indictment. The defendant was convicted and judgment rendered against him for the fine; he moved in arrest of judgment; his motion being overruled, he appealed to this court. The indictment is not good under any of the provisions in our criminal code; but we consider the offence therein charged to be an offence indictable at common law, and that the indictment is good as a common law indictment. The charge is "that the defendant did on the 25th of August, A. D. 1856, at the county of Laclede, in a certain large assembly of males and females in said county, and in the hearing of said assembly of persons, unlawfully, wickedly and scandalously use vulgar, obscene and indecent language, by then and there asking some of the males, &c., [here the questions are inserted in the indictment, which are too vulgar to be inserted in this opinion,] and was then and there guilty of open and notorious acts of public indecency, grossly scandalous, to the

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manifest corruption of the morals of said assembly, contrary," &c.

We have no statute punishing a person for the use of vulgar, indecent and obscene words in public. There has not been an attempt to legislate on this particular offence. It was an offence at common law, because it was against good morals—against public decency. Russell, in his Treatise on Crimes, (1 vol. p. 46,) says: "And it seems to be an established principle that whatever openly outrages decency and is injurious to public morals is a misdemeanor at common law." "The common law," said Judge White, in the case of Gresham & Ligan v. The State, 2 Yerger, "is the guardian of the morals of the people and their protection against offences notoriously against public decency and good morals." Blackstone lays it down that "any grossly scandalous and public indecency is indictable and punishable in the temporal courts by fine and imprisonment." (4 Black. Com. 41.) It was held in the case of Bell v. The State, 1 Swan, 42, that "the utterance of obscene words in public, being a gross violation of public decency and good morals, is indictable; and in a prosecution for the utterance of obscene language in public, it is not necessary that the words should be proven exactly as charged to have been spoken. Many cases have been held indictable as being *contra bonos mores*." (4 Black. Com. 41.) "All indecent exposure of one's person to the public view, and it may be laid down in equal terms that all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency are indictable, whether committed by *words* or *acts*." (4 Black. Com. 65, note.)

Our respect for the chastity of the records of our court will not suffer the outrageously vulgar words that were spoken and sung by the defendant in this case, in the hearing of both males and females, to be put on the records. But we have never had to examine the records of our inferior tribunals to find words more shocking to one's sense of decency than those charged and proved in this case. Tilghman, C.

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J., in the Commonwealth v. Sharpless, 2 S. & R. 101, said: "That actions of *public indecency* were always indictable as tending to corrupt the public morals, I have no doubt. What tended to corrupt society was held to be a breach of the peace and punishable by indictment. The courts are guardians of the public morals, and therefore have jurisdiction in such cases. Hence it follows that an offence may be punishable if in its nature and by its example it tends to the corruption of morals, although it be not committed in public. (Barker et al. v. Commonwealth, 19 Penn. 412.) The offence charged in this indictment, being an offence against public morals and decency, was indictable as such at common law, and is indictable with us as a common law offence. We consider the indictment sufficiently good, and that the court did not commit error in refusing to grant a trial, or in refusing to arrest the judgment. Judge Scott concurring, the judgment is affirmed.

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VAUGHN, Defendant in Error, v. TRACY, Plaintiff in Error.

1. Possession of real property under an unrecorded deed, though brought home to a subsequent purchaser, does not constitute, as a matter of law, actual notice of such prior deed within the meaning of our registry act.
2. Possession and apparent ownership are, however, facts from which a jury will be warranted in inferring actual notice.
3. Where the evidence relied on to bring home to a subsequent purchaser actual notice of a prior unrecorded deed is a declaration of such subsequent purchaser to the effect that his grantor had told him before his purchase that the plaintiff (the prior purchaser) "had a mill on the land and would have to move it away now," it is error to instruct the jury that "if the plaintiff was on the acre of land and mill thereon at the time of the defendant's purchase, and that fact was then known to defendant, it was a sufficient notice in law of the plaintiff's previous purchase so as to affect the defendant with notice of the plaintiff's title."

Error to Osage Circuit Court.

This was a suit for the possession of, and to obtain the legal title to, a tract of one acre of ground upon which was a horse grist-mill. The plaintiff introduced in evidence an instru-

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ment under seal, being articles of agreement between himself and one W. R. Huckstep, dated March 3, 1845. By this instrument Huckstep engaged to convey to Vaughn a tract of eighty acres of land; and it was recited therein that one acre of the tract, "whereon the mill now stands," had been previously sold by Huckstep to Vaughn for sixty dollars. This instrument was not acknowledged, but was recorded September, 1846. Defendant Tracy claimed title under a deed from Huckstep, dated February, 1852, conveying eighty acres, including the acre in controversy. At the date of the deed to Tracy plaintiff was in possession of the acre lot, and had been for eight or ten years previously.

The remaining facts are sufficiently set forth in the opinion of the court.

Parsons for plaintiff in error.

I. The instrument of writing executed by Huckstep and Vaughn was inadmissible. It was not acknowledged. (R. C. p. 226, sec. 42.) Further, there was no proof of the execution of this instrument of writing.

II. There was no evidence tending to show that Tracy had notice of an adverse possession in the defendant in error. The declarations of Tracy are the only evidence on this point. He said Huckstep told him the defendant had a mill on the land, but he would have to move it now. If Tracy relied on this statement of Huckstep, he was evidently led to believe Vaughn had no adverse title in the land. That he did rely upon Huckstep's statements there is no doubt. He resided upwards of one hundred miles from the land; had never seen it until after his purchase; relied on Huckstep's statements as to the quantity and quality of the land. He complained that Huckstep had misrepresented the quality of the land; that there were more rocks upon it than he had supposed; that Huckstep told him there were fruit trees on the land, which was untrue. For these reasons the instructions asked by the plaintiff in error, and refused by the court, ought to have been given. (See this case in 22 Mo. 415.) If the declarations of Huckstep to Tracy were any notice at

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all, it can only be understood as a notice of tenancy of Vaughn under Huckstep, and not as an adverse possession. (See Beatie v. Butler, 21 Mo. 818.)

Morrow, for defendant in error.

I. The paper writing offered in evidence was properly admitted without proof of its execution. Its execution by Huckstep was alleged in the petition and not denied in the answer. (See Practice Act; Sess. Acts, 1849, p. 80, sec. 7.)

II. Open and notorious possession of a tract of land by a party claiming title under an unrecorded deed, and the knowledge of such possession, being fastened upon a subsequent purchaser at or before the time of such subsequent purchase by the verdict of a jury, affect each subsequent purchaser with actual notice of the prior purchaser's title. (Vaughn v. Tracy, 22 Mo. 415; Sanders v. Brant, 10 Howard, 348.)

LEONARD, Judge, delivered the opinion of the court.

When this case was here before, (22 Mo. 417,) we remarked that we all concurred in reversing the judgment on the ground that "possession was not, as the circuit court seemed to suppose, as a mere matter of law, actual notice within the meaning of the recording acts;" and we then observed that we deferred, until all the circumstances of the transaction should be fully developed in a new trial, our opinion on the question "how far and under what circumstances the fact of open and notorious possession and apparent ownership of real property was to be considered evidence of actual notice." A majority of the judges then intimated their opinion that the actual notice of the statute was a fact to be proved as any other fact, and that, as men rarely purchased farms without examining them personally, the fact of possession might, under ordinary circumstances, be fairly presumed to have been within the purchaser's knowledge when he bought; and that in this state, where the land is generally in the occupation of owners in fee, if knowledge be brought home to the purchaser

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that a third person is in the possession and apparent ownership of land, it ought, under ordinary circumstances, to be deemed sufficient information to the second purchaser that the possessor is the owner in fee under a title derived from the former owner. They also remarked substantially that the circumstances might be such as to show that the purchaser did not in fact know that any third party was in possession, or, if he did know it, they might have shown that his occupation was not as owner; and that in such cases the jury could not find the fact of actual notice.

This new trial has now been had, and the evidence given was to the effect that there was a house and farm on the land; that the plaintiff was at the time of the defendant's purchase, and had been for eight or ten years previously, in the possession of a mill situate on the land, with an acre of ground attached to it, and that the defendant resided at the time he purchased in the county of St. Louis, about one hundred and fifty miles from the land, and had not been previously in the county where the land lay. The plaintiff then, in order to show that the defendant knew, at the time he made the purchase, that the plaintiff was in the possession of the mill and acre of ground, gave in evidence the statements of defendant—made on several occasions, in answer to the inquiry whether Huckstep, his grantor, had not told him before the sale that he (Huckstep) had sold the mill and acre of ground to the plaintiff—to the effect that “he told him plaintiff had a mill on the land and would have to move it now.” Upon this evidence the court directed the jury that “if the plaintiff was on the acre of ground and mill, thereon at the time of the defendant's purchase, and that fact was then known to the defendant, it was a sufficient notice in law of the plaintiff's previous purchase so as to affect the defendant with notice of the plaintiff's title,” and that “possession of a tract of land by one claiming to have previously purchased it is *sufficient evidence* of such previous notice if such possession was known to the subsequent purchaser at the time of his purchase.”

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These instructions, taken in connection with the evidence, must, we think, have misled the jury, and for that reason the judgment will be reversed and the cause remanded. The question of fact for the jury was whether the defendant purchased with "actual notice" of the prior unrecorded conveyance to the plaintiff; or, in other words, whether he believed, when he bought the land, that his grantor had previously sold the mill tract to the plaintiff. If there were no circumstances disclosed other than that it was the purchase of a farm, and that there was at the time a mill on the land, with an acre of ground attached to it, in the occupation of the plaintiff as the apparent owner, these facts would, in my opinion, have been competent evidence to show that the defendant purchased with actual knowledge of the previous sale to the plaintiff. They would, I think, have been sufficient in point of law to have been submitted to the jury for this purpose; but whether when received they would have satisfied the jury of the truth of the alleged fact would be a matter for their consideration. In this state lands are usually found in the occupation of the owners in fee, and therefore we generally infer from this occupation and apparent ownership that the occupant is the real owner, and of course that he has a title to it derived from the former proprietor; but this possession and apparent ownership, even if brought home to the subsequent purchaser, do not constitute, in point of law, actual notice of the prior deed within the meaning of the statute. It is evidence of such knowledge, and under ordinary circumstances ought, I think, to satisfy a jury that the party purchased with knowledge of the prior deed, and such is the opinion expressed, or at least intended to be expressed, by the judge who delivered the former opinion in this case.

From the proof here, the jury might have inferred, and no doubt did infer, that the defendant made the purchase at a distance from the farm and without any personal examination of it; and the plaintiff therefore resorted to the defendant's admissions in order to show his knowledge of the plaintiff's pos-

Phillebart v. Evans.

session and apparent ownership of the mill and ground. These admissions, however, instead of establishing that fact, were rather to the effect that the defendant's information was that the plaintiff owned the mill, and was occupying the land upon which it stood at the will of the owner (Huckstep); or, in other words, that the plaintiff, instead of being in possession of the land as owner, was there as the mere tenant at sufferance of the owner, and was bound to remove his mill whenever Huckstep disposed of the land.

Upon this evidence the jury was told that if the plaintiff was on the land and the defendant knew it, this was sufficient notice in law of the plaintiff's previous purchase, when of course such a possession, not as owner but as the mere tenant at will of the owner, afforded no evidence whatever of any conveyance to the plaintiff. The judgment must be reversed and the cause remanded.

PHILLEBART, Plaintiff in Error, v. EVANS *et al.*, Defendants in Error.

1. The fact that the return of service of process is defective is no ground for dismissing a suit.
2. A defendant who appears and files an answer to a petition will be precluded from taking advantage of a defect in the return of service of process upon himself.

Error to Kansas City Court of Common Pleas.

Hovey, for plaintiff in error.

The defendant having appeared and answered could not avail herself of an imperfect return of the summons; and whether good or bad it had answered the end for which it was made. It had caused defendant to appear and answer. (See *Bartlett v. McDaniel*, 3 Mo. 40.)

Napton, for defendant in error.

State v. Feaster.

RYLAND, Judge, delivered the opinion of the court.

From the record in this case it appears that the marshal of Kansas served the petition and writ on the defendant and made his return thereon. The defendant appeared and filed her answer to the plaintiff's petition. She afterwards moved for leave to withdraw the answer, and it was granted to her. She then moved to dismiss the plaintiff's suit, and assigned as a reason therefor the insufficiency of the marshal's return in the writ. The court sustained this motion and dismissed the plaintiff's suit. This was excepted to by the plaintiff, who brings the case here by writ of error.

The judgment of the court below dismissing the plaintiff's suit is erroneous and must be reversed. The defendant had made her appearance to the action and filed her answer. To allow her afterwards to withdraw the answer and move to dismiss the plaintiff's action was improper. The court should have overruled her motion to dismiss. The writ is to bring the party into court, and when the defendant appears and files an answer there is no necessity to see whether the marshal's return is in strict conformity to the law or not. The judgment must be reversed. (See Bartlett v. McDaniel, 3 Mo. 40.) An imperfect return of an officer serving a writ and petition is no reason for the court to dismiss the plaintiff's suit. The judgment is reversed; Judge Scott concurring; Judge Leonard absent.



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THE STATE, Appellant, v. FEASTER, Respondent.

1. An indictment founded on section 38 of article 2 of the act concerning crimes and punishments (R. C. 1845, p. 851) charged that the defendant did "feloniously make an assault on the body of one C. H. with a large stick of the length of four feet and the thickness of four inches, which stick he the said E. F. then and there held in both his hands, and with the stick aforesaid did then and there inflict on the body of the said C. H. great bodily harm under such circumstances which would have constituted manslaughter if death had ensued, contrary," &c.; *held* insufficient in that it did not charge the inflicting of the great bodily harm feloniously.

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Appeal from St. Clair Circuit Court.

Ewing, (attorney general,) for the State.

The indictment is sufficient. The facts and circumstances constituting the offence are averred in the indictment, and the expression "under circumstances which would have constituted manslaughter if death had ensued" may be rejected as surplusage. (R. C. 1845, sec. 38, p. 351; Jennings v. The State, 9 Mo. 852.) It was not necessary to aver that the weapon used was a dangerous or a deadly one. This sufficiently appears from the description given in the indictment, and no more was required. (Jennings v. The State, 9 Mo. 852; 11 Mo. 579; The State v. Magrath, 19 Mo. 678.) If the word "feloniously" appear in any part of the indictment it is sufficient. (1 Chitty C. L. 242.)

F. P. Wright, for respondent.

I. The decision of the court below is correct. The indictment is clearly bad. The offence is not the assault but the bodily harm inflicted. Bodily harm is the accusation. It is not alleged that this was done feloniously. This omission is fatal. An indictment for felony must always allege the fact to be done feloniously. (2 Hale, 184; 2 Hawkins, 320, § 55; 9 Mo. 730; Wharton, 196; 1 Breese, Ill., 199.) The term felony originally denoted the penal consequences of the crime, but by long usage it is now employed to signify the crime itself. (4 Black. 69; 1 Chitty C. L. 238.) Unless the bodily harm was inflicted feloniously it was not indictable. The term "felonious" is the only one appropriated by the law to express the nature and character of this accusation. It being omitted in the indictment, it presents a case punishable only before a justice of the peace.

II. The description of the offence is not sufficient. It amounts to this and no more: "Elbert Foster made a felonious assault on Carrol Harper with a large stick, and with the stick did inflict on the body of Carrol Harper great bodily

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harm." All the facts necessary to constitute the offence must be charged by express averment or the judgment will be arrested. (Kit v. The State, 11 Humph. 167.)

RYLAND, Judge, delivered the opinion of the court.

The defendant Feaster was indicted at the March term of the Circuit Court for Hickory county, in the year 1855. At the September term he appeared to the indictment and filed his petition for a change of venue, which was granted and the venue changed to the Circuit Court of St. Clair county. At the October term, 1855, of the Circuit Court for St. Clair county, the parties appeared and the case was continued until the next term. At the May term, 1856, the defendant filed his demurrer to the indictment, which was overruled. The case was then continued from term to term until the March term, 1857, when the defendant pleaded not guilty to the indictment, and a trial was had. The defendant was convicted by the jury and fined. He afterwards moved in arrest of judgment, which motion being sustained, the State excepted and brings the case here by appeal.

The only questions in the case arise on the indictment. The indictment is founded on the 38th section of article 2 of the act concerning crimes and punishments, (R. C. 1845, p. 351,) which declares, "If any person shall be maimed, wounded, or disfigured, or receive great bodily harm, or his life be endangered by the act, procurement or culpable negligence of another, in cases and under circumstances which would constitute murder or manslaughter if death had ensued, the person by whose act, procurement or negligence such injury or danger of life shall be occasioned, shall, in cases not otherwise provided for, be punished," &c. The indictment charges "that Elbert Feaster, with force and arms, did then and there feloniously make an assault on the body of one Carrol Harper with a large stick, of the length of four feet, and the thickness of four inches, which stick he, the said Elbert Feaster, then and there held in both his hands,

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and with the stick aforesaid did then and there inflict on the body of the said Carroll Harper great bodily harm, under such circumstances which would have constituted manslaughter if death had ensued, contrary," &c.

The offence under this section is liable to the punishment of imprisonment in the penitentiary, and consequently under our law is a felony; for all offences whose punishment may be by confinement in the state penitentiary are declared by the statute to be felonious. The offence under this section is not the assault; it is the great bodily harm inflicted.

Now it is the well settled law that in indictments for felonies the act charged which constitutes the offence must be alleged to have been done feloniously. In this indictment now under consideration the pleader has omitted to charge that the act done which makes the offence was done feloniously, and it is not enough to aver that the assault was made feloniously. This is a fatal objection. The court below therefore committed no error in arresting the judgment in this case. Judge Scott concurring, the judgment is affirmed.

ELLIS, Respondent, v. ANDREWS, Appellant.

1. A bill of exceptions can not, except by consent, be allowed and signed subsequently to the term at which the trial is had.
2. Where it is agreed that the bill of exceptions may be allowed and filed within ten days after the end of the term, and it is not allowed and signed within the ten days, it can not be afterwards allowed and signed.

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Appeal from Cooper Court of Common Pleas.

The facts sufficiently appear in the opinion of the court.

Stephens & Vest, for appellant, cited Stephen on Pleading, 160; 3 Bouv. Inst. 261; Chitty Pl. 518; Wood v. Steamboat Fleetwood, 19 Mo. 529; Swartz v. Chappell, 19 Mo. 304; Rucker v. Eddings, 7 Mo. 115; Brighter v. Cooner, 18 Mo. 347; Foster v. McO'Blenis, 18 Mo. 88.

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Douglass and Hayden, for respondent.

The bill of exceptions should have been presented and signed in term, or ten days thereafter, as counsel agreed it should be. The bill of exceptions was not presented and signed during the term, nor within ten days thereafter, and was signed against the consent of respondent. The bill of exceptions not having been presented and signed in proper time should be stricken from the record, and the judgment below affirmed. (Farrar v. Finney, 21 Mo. 569.)

SCOTT, Judge, delivered the opinion of the court.

It has long been settled that a bill of exceptions must be signed during the term at which the cause is tried. This is not only the practice here, but also in other states. In England, where the statute first allowing a bill of exceptions to the parties to a suit had its origin, it is held that courts are not bound to seal a bill of exceptions tendered at the succeeding term of the court. (Wright v. Sharp, 1 Salk. 288; Sikes v. Ransom, 6 Johns. 279; 9 Johns. 346; Pomeroy v. Selmes, 8 Mo. 132.) The rule has been so far departed from that it is permitted to sign a bill of exceptions at a period subsequent to the term at which the trial takes place, when the consent of the parties is given to such a course and that consent is made a matter of record. (Pomeroy v. Selmes, 8 Mo. 732.)

In the case before us it was agreed that the bill of exceptions should be made out and filed within ten days from the end of the term. It was not done within the time agreed upon, but afterwards and against the consent of the plaintiff. It is now proposed by affidavits to show why the bill of exceptions was not signed within the stipulated time. It is obvious that such a course would be a departure from the practice, which requires that when a bill of exceptions is not signed during the term at which the trial takes place, it must appear by the record that consent was given that it should be signed at a subsequent period. This bill of exceptions is signed after the trial term and against the consent of the

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party to be affected by it. It is easy to see the consequences which may result from such a practice; we would not know when a suit was terminated. After a cause is reasonably supposed to be at an end, a suit or strife is commenced in this court in order to have it reversed.

If this practice is countenanced, then, had the judge who tried the cause refused to sign the bill, the party would have a right to come here by a mandamus to compel him to do so. Are judges to be permitted to sign bills of exceptions when they please—bills of exceptions that may be prepared without the knowledge of the party to be affected by them and against his consent? This would be a dangerous engine in the hands of any judge, and, if allowed, suitors would not know when their controversies were at an end. The remark of Judge Tompkins, in speaking in relation to this subject, is strictly correct, “that he who defers till another time to do what he ought to do at the present time, must take to himself all the consequences of his negligence.” (*Consaul v. Lidell*, 7 Mo. 257.) This bill of exceptions is stricken out of the record, nothing beyond the control of the party appearing to have prevented its being signed within the time agreed upon.

As the only errors relied upon for a reversal of the judgment are assigned upon matters appearing only by the bill of exceptions, and as the bill is stricken out, the judgment will be affirmed. Judge Ryland concurring; Judge Leonard absent.

FRANSE, Plaintiff in Error, v. OWENS *et al.*, Defendants in Error.

1. Where an action is commenced in a justice's court by process, it is not necessary that a confession of judgment should be in writing.
2. Where a defendant in a justice's court appears at the return day of process and confesses a judgment, and an entry of such confession is made upon the justice's docket, an execution may lawfully issue, although no entry is made upon the docket of a judgment upon the confession.
3. Where a defendant in a suit before a justice's court is served with process in the township in which the suit is begun, it will be presumed, in the absence

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51 ^a	476
25	329
74 ^a	211
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146	152
25	329
84 ^a	255

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of evidence to the contrary, that he resides in such township; the return of a constable of such township on an execution directed to him of "no property found of defendant in said township whereof to levy," is sufficient to warrant the issuing of an execution from the office of the clerk of the circuit court.

4. An authentication of a transcript of a judgment by a justice of the peace in the following form: "I certify that the foregoing contains an entry made on my docket. [Signed] A. B., J. P." is sufficient.

Error to Cass Circuit Court.

This was a suit to set aside a conveyance made by one Mead of a tract of forty acres of land, dated September 20th, 1852, on the ground that it was a voluntary conveyance, and made to defraud the creditors of said Mead, of whom one Fonda was one. Plaintiff claimed title as a purchaser at sheriff's sale under an execution issued from the office of the clerk of the Cass Circuit Court, upon a transcript of a judgment of a justice of the peace of Cass county, in favor of Abram Fonda. The said execution was issued November 24th, 1854. The plaintiff received a deed from the sheriff. At the trial the plaintiff, Franse, offered in evidence a certified copy of the transcript of a judgment against said Daniel Mead, in favor of Abram Fonda, rendered by a justice of the peace in Cass county, and filed in the office of the clerk of the Circuit Court of Cass county, February 23, 1854. This transcript is as follows:

" Abram Fonda v. Daniel Mead and W. G. Gardiner. Debt, \$30; damages, \$5.90; justice, 75 cents; constable, 50 cents. In justice's court. Action on note of hand and reads thus: 'October 6, 1849. Twelve months after date, we promise to pay to the order of Abram Fonda \$57.49, without defalcation or discount. [Signed] Daniel Mead, W. G. Gardiner.' The above note credited Oct. 4th, 1850, by \$22.50; do. December 18, 1851, by \$5.90. Summons issued 27th day of July, 1853; returned 6th August, 1853; Elijah Owens deputised to execute and return said writ. August 6th, 1853—summons returned executed by reading the same to Daniel Mead, in Mount Pleasant township; and the said

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Daniel Mead appeared and confessed judgment on said note for the sum of \$30 debt and \$5.90 damages—one dollar cost. [Signed] Hiram Stephens, J. P.

“Issued execution August 6th, 1853—and given to S. L. McGuire, constable of Mount Pleasant township, returnable in sixty days from the date. This execution returned with ‘no property found belonging to defendant to levy the same in Mount Pleasant township. S. L. McGuire, constable. Mount Pleasant township, this 6th October, 1853.

“I certify that the foregoing contains an entry made on my docket. February 23, 1854. [Signed] Hiram Stephens, J. P.

“[Endorsed.] The foregoing transcript was filed and recorded on the 23d day of February, 1854. [Signed] H. Finney, clerk.

“State of Missouri, county of Cass, ss. I, Hamilton Finney, clerk of the Cass Circuit Court, do hereby certify, that the foregoing is a full, true, and perfect copy of the transcript filed in my office, in the above entitled cause, wherein Abram Fonda is plaintiff, and Daniel Mead and W. G. Gardiner are defendants. In testimony whereof, &c. [Signed] Hamilton Finney, clerk. (Seal.)”

The court, on the objection of defendants, ruled out the said transcript; whereupon the plaintiff took a nonsuit with leave to move to set the same aside. A motion to set aside the nonsuit was overruled.

Peyton and Napton, for plaintiff in error.

I. Both the certified copy and the original transcript offered in evidence show that the justice had jurisdiction of the subject matter and person of defendant. The action against Mead was commenced by process; the same was served upon him; he appeared and confessed judgment; an entry of the confession is made on the docket, and though no entry of judgment was rendered by the justice upon the confession, yet the court will give the force and effect of one to the confession so soon as the same is entered on the docket of the

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justice. (*Davis v. Wood*, 7 Mo. 162; *Rutherford v. Winn*, 3 Mo. 14; *Chamberlain & Churchill, v. Mammoth Mining Co.* 20 Mo. 96.) The justice had the statutory right to empower a person other than the constable to serve process upon defendant; nor is it necessary that the justice should state upon his docket that this was done at the "request and risk" of plaintiff. The transcript shows that the person who executed the writ upon defendant was authorized to do so by the justice, and this is all that it is needful to show. Again, it will be seen from the transcript that the demand of Fonda, the plaintiff, was filed with the justice, and that a summons issued thereon against Mead to answer the complaint of plaintiff, and this, it is contended, is of itself directly within the meaning of this law the commencement of an action by process; and if Mead, without any service whatever, had voluntarily appeared to the writs and made oral confession of judgment, the same would have been good. In this case service was had and by a person to whom the law gave all the authority of a constable. (R. C. 1845, tit. Justices' Courts, art. 2, sec. 17; 6 Mo. 57.)

II. The transcript should have been admitted as evidence in the Circuit Court, first, to show a judgment before the justice, and then that an execution was issued by the justice and returned that defendant had no property whereof to levy. The transcript showed both these facts, and ought to have been read as evidence. The return of the sheriff is sufficient and shows a full compliance with the law. The statute in no case requires that the execution issued by the justice shall be executed throughout the county before one can be issued on the transcript in the clerk's office. A constable has no right to levy an execution in any part of the county; certainly it is not his duty to do so, save only in the cases pointed out in the statute. The first is where the defendant resides out of the township where judgment was rendered; second, where he has goods and chattels out of the same, but in a different township; and, third, when there are several defendants residing in different townships. In these cases, and

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only then by the consent and at the option of plaintiff may he execute the writ in any part of the county. In all other cases the constable is not bound to go out of the township. If the return is insufficient, it was the duty of defendant to have appeared at the return day of the writ and made his motion to quash the same; failing, and not even now complaining, strangers to the judgment will not be allowed to avoid the sale and whole proceedings under the transcript on account of any irregularity in the return of the constable. If the return of the constable be wholly illegal, yet the transcript ought still to have been admitted as evidence in order to show the rendering of a judgment. The plaintiff might then prove that another execution issued and was properly returned. (*Crowley v. Wallace*, 12 Mo. 143; R. C. 1845, tit. Justices' Courts, art. 7, sec. 6; R. C. 1845, tit. Justices' Courts, art. 6, sec. 18; *Coonce v. Munday*, 3 Mo. 265.)

III. The certificate put by the justice to the transcript is a good one. The justice at the bottom of the transcript certifies that the "foregoing contains an entry made on my docket." The court will have regard to the substance and meaning of the certificate and not the mere technical form; the one appearing to the transcript means that the whole statement above it is a copy of an entry in his docket. At any rate the justice certifies that the "foregoing" contains an entry made on his docket, and upon looking at the transcript we find an entry to which this court will give the force and effect of a judgment. The statute only requires that the justice should give a certified transcript of the judgment and nothing else. It is very plain however that the justice in his certificate treats the whole transcript as one entry—means to and does certify that every part of the same is copied from the docket. It is submitted the certificate is good. (Lee's Adm'r v. Lee, 21 Mo. 531; *Gipson v. Allen*, 10 Mo. 303; R. C. 1845, tit. Justices' Courts, art. 6, sec. 17.)

Sheley, for defendants in error.

In this case the justice's execution was issued to the constable of the township in which the defendant was served.

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In such cases the execution was co-extensive with the county, and the return must show that there were no goods or chattels of the defendant in the county ; but the return is confined to the township, and for aught that appears the defendant had ample means in the county ; the court therefore properly rejected the transcript. (R. C. 1845, p. 660-1, secs. 3-6 ; Coonce v. Munday, 3 Mo. 264.)

II. The transcript shows no judgment. It only shows that the defendant made his voluntary appearance after process was issued and confessed the debt, but there was no entry of judgment by the justice.

III. The justice's certificate to the transcript was insufficient. He ought to have certified the transcript was a true copy of the judgment in the case referred to.

SCOTT, Judge, delivered the opinion of the court.

In justices' courts, where the action is commenced by process, it is not necessary that a confession of judgment should be in writing, signed by the defendant and filed by the justice. The statutory provision on this subject is explicit. In proceedings in justices' courts forms are disregarded, and it is not expected that entries should be made with the accuracy and precision which are required in recording the acts of courts of record. In the case of Rutherford v. Winn, 3 Mo. 12, this court disregarded the objection that no judgment was entered on a verdict rendered in a justice's court. We see no distinction between that case and one where no formal judgment is entered on a confession. The defendant appeared at the return day of the process and confessed a judgment for specific sums for debt, damages and costs. This was sufficient whereon to issue an execution.

The statute authorizing the transcript of a justice's judgment to be filed in the office of the clerk of the Circuit Court only requires the execution to be issued by the justice to be directed to the constable of the township in which the defendant resides. The defendant was served with process in the township in which the suit was begun, and in the absence of

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all evidence to the contrary we must regard that as his place of residence. There is nothing in the record showing that an execution out of the township would have been available. We are therefore of the opinion that the return of the constable on the execution, that there were no goods nor chattels of the defendant whereof to levy the same in the township to which the writ was directed, was sufficient to warrant an execution from the circuit court clerk's office, and that it was not necessary that the return should show that there were no goods or chattels of the defendant in the county whereof a levy might be made.

We are of the opinion that there is no weight in the objection to the authentication of the justice's transcript. The following is the act of authentication : "I certify that the foregoing contains an entry made on my docket." This certificate is made to a copy of the judgment and the subsequent proceedings thereon. The statute does not require that a full and perfect record of the proceedings in the justice's court should be filed in the office of the clerk of the circuit court ; "a transcript of the judgment" is all that is exacted. We see from the paper that it is in the usual form of transcripts made by justices. It is a transcript of the judgment, and the thing itself being seen, we do not understand why it should be rejected as evidence because the justice in certifying it has failed to term it a "transcript." The withholding of all power from justices of the peace to interfere with their records when once made up may have been the reason that the legislature deemed a transcript of the judgment a sufficient foundation for an execution. Reversed and remanded ; Judge Ryland concurring ; Judge Leonard absent.

BROWN, Respondent, v. LEWIS *et al.*, Appellants.

1. Where there is no evidence whatever tending to show a liability on the part of one of two defendants, the court should, when requested so to do, direct the jury to find a verdict in his favor.
2. It is error to give instructions where there is no evidence to support them.

Brown v. Lewis.

Appeal from Platte Circuit Court.

This was a suit originally brought before a justice of the peace by E. W. Brown, against Sarah J. Lewis and Daniel P. Lewis, to recover the sum of \$75, the alleged value of services rendered by plaintiff in treating at his eye infirmary an affection of the eyes of a child of the defendant Sarah J. Lewis. There being no evidence whatever introduced by plaintiff showing or tending to show a liability on the part of the defendant Daniel P. Lewis, the defendants moved the court to direct the jury to find a separate verdict as to the said D. P. Lewis, in order that his co-defendant might have the benefit of his testimony. The court overruled the motion.

Spratt and Merryman, for appellants.

Ryland, Judge, delivered the opinion of the court.

The court below should have directed the jury to pass upon the case, so far as it concerned the defendant Daniel D. Lewis. There is not a particle of evidence preserved on the record showing his connection with the contract made between plaintiff Brown and Sarah Jane Lewis. It is manifest that he was made a party improperly. He made no contract with Brown on the subject of medical service by Brown to be bestowed on the child of Mrs. Sarah Jane Lewis. He must have been joined in the suit by plaintiff from improper motives, to exclude his testimony; and it was the duty of the court to counteract such trickery and device, by directing the jury to pass on the defendant Lewis— instructing them that there was no testimony in the case connecting or showing that Daniel P. Lewis had any thing to do with making the contract, or was in any manner bound by it.

Under the English law this rule of practice was confined to actions against wrong-doers, and was not applied to actions upon contracts, except, perhaps, in cases where one of several defendants has pleaded a personal discharge, as a certificate in bankruptcy; (see *Currie v. Child*, 3 Camp. 283;

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Emmet v. Butler, 7 Taunton, 599; 1 Moore, 332; Bate v. Russell, Moody & Mal. 382;) but with us, under our law—the altered condition of it in relation to suits upon joint indebtedness—it is otherwise. (Campbell et al. v. Hood, 6 Mo. 211; Hood v. Mathis, 21 Mo. 308.) In the case of Hood v. Mathis this subject has been fully discussed, and it is now well settled that the rule is the same with us as well in actions on contract as of torts. The court therefore erred in overruling the defendant's motion to direct the jury to pass on the defendant D. P. Lewis.

As the judgment below must be reversed, and the case will have to be retried, we will notice some other matters complained of by the appellants. It was competent to the defendants to prove by the opinions of physicians the time it was supposed to take in order to cure the child's eyes. It was also competent and highly important to prove the condition of the child's eyes when taken away from the plaintiff's infirmary, and whether they were cured or were lost to the child. The instruction given by the court for plaintiff is calculated to mislead the jury; there was no evidence authorizing the court to bring to the jury the subject of the "defendants, or either of them, preventing the plaintiff from curing the child by taking the child away." This instruction was from the state of the evidence improper. These matters are mentioned by us in order that the court may avoid the errors complained of on the next trial. We barely mention them, and pronounce the rulings of the court on them to be erroneous in order to avoid them in future.

Let the judgment be reversed and the cause remanded; Judge Scott concurring.

State v. McClure.

THE STATE, Respondent, v. McCLURE, Appellant.

1. The Supreme Court will not interfere and grant a new trial on the ground that the verdict of a jury was against the weight of evidence.
2. Whenever instructions given to a jury as a whole fairly present the law of the case to the jury, the Supreme Court will not reverse for a defect or slight impropriety in any particular instruction.
3. There may be an assault with intent to kill, although there is no striking or wounding ; it would be error to instruct the jury that if the defendant might have struck and did not they should find defendant not guilty.

*Appeal from Laclede Circuit Court.**Wright, for appellant.*

I. It is submitted whether such a " strong and unequivocal " case is not here presented as to require this court to direct a new trial, regardless of the errors of the court below in giving and refusing instructions, but on account of the entire failure to prove a felonious assault. The prosecutor was too much intoxicated to either observe or recollect what transpired at the time ; and even he says that he does not know that defendant struck at him or intended to strike at him. (2 Phil. Ev. 763 ; 2 Day, 202.) Taking his evidence as a correct detail of the facts, it would amount to no more than an ordinary assault and battery. His evidence did not even tend to prove a felonious assault. The evidence of all the witnesses except the prosecutor showed there was not even a common assault. An assault is an offer to do a corporeal injury to another, with the present ability to do so. Defendant was about ten feet from the prosecutor when he raised the stick. He was not within striking distance, and readily laid down the stick when told to do so. It devolved on the State to prove an *intention* not only to do an injury, but an intention to kill. (3 Greenl. Ev. § 61, 17.)

II. The first instruction given on the part of the State is wrong. The natural consequence of even striking with a stick is not to kill. It was the peculiar province of the jury to determine the intent. The instruction was a comment and

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an erroneous comment on the evidence, and evidently controlled the jury in finding their erroneous verdict. The law is that the court shall not comment on the evidence, or charge the jury as to matter of fact, unless requested. (R. C. 1195, sec. 31; State v. Dunn, 18 Mo. 419.)

III. The court erred in refusing the first instruction asked by defendant. If the defendant could have struck the prosecutor without hindrance, and did not do so, it conclusively rebutted any intention to kill.

Ewing, (attorney general,) for the State.

Ryland, Judge, delivered the opinion of the court.

The defendant was indicted for an assault with intent to kill. He was convicted and fined. He moved for a new trial, which was overruled; he then moved in arrest of judgment, which was also overruled. He excepted and brings the case here by appeal.

In this court the appellant has made three points, on each of which he relies for a reversal. The first is that there is no evidence warranting or authorizing the conviction; the second, that the first instruction given on the part of the State is wrong; and the third, that the court erred in refusing the first instruction asked by the defendant. From an examination of the testimony preserved in the bill of exceptions, this court clearly perceives that there was testimony on the part of the State from which the jury might well convict. There was also testimony which would have justified the jury in acquitting. The jury was the proper tribunal to weigh the evidence; they might give to the evidence on behalf of the State more credence than they did to the evidence of the defendant. The case was left to the jury and they found the defendant guilty, and there was evidence from which such a finding could be supported. The court will not interfere in such cases. This is not like the case of the State v. Gresson, 19 Mo. 247. In Gresson's case there was no evidence of the crime. Here the jury might have found either way. We will not for this reason reverse.

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The second point. The instruction complained of is as follows : " If the jury believe from the evidence that the defendant attempted to strike Day with a stick, and at the time he made the attempt he was near enough to hit him, and that the stick was a dangerous or deadly weapon or calculated to produce death, and that there was no justifiable excuse for such attempt to strike with such a weapon, and [sic] under such circumstances, is evidence from which the jury may infer that such assault was made with intent to kill." Now whatever might be urged against this instruction standing alone, it ceases to have any improper effect when united with the instruction given for the defendant, as follows : " Unless the jury believe from the evidence that the defendant attempted to strike Reuben P. Day with a stick and with *the intent* to kill him, and that at the time the defendant made the attempt he was near enough to hit Day, and that the defendant could have killed Day with the stick, *they must acquit the defendant.*" These instructions together put the law of the case fairly before the jury, and no injurious effect from the first one could have been left on the jury when the last was given. Whenever the instructions as a whole fairly present the law of the case to the jury, the court will not reverse for any defect or slight impropriety in any particular instruction.

There is no error in the court's refusing the defendant's first instruction. " If the jury believe from the evidence that defendant could have struck Day with the stick, and did not do it, *they will find defendant not guilty.*" This instruction is not the law ; it was designed to tell the jury that whenever there was power and opportunity to commit a battery, and it was not committed, there could be no assault. A man may assault another with the intent to kill him, and not perpetrate the offence of striking or wounding him.

These are all the objections urged in this court by the appellant's counsel for a reversal of the judgment. The newly discovered evidence, and the motion in arrest, are not urged here, but may be considered as abandoned by the appellant. The punishment is less than that allowed by law ; but the

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defendant's counsel remarked that the punishment was declared under the revised code of 1855, at the request of the defendant, and therefore does not urge that matter as an error; it is in his favor, and he does not complain of it. It is necessary however to remark, that whenever the punishment for an offence committed under the law previous to the revised code of 1855 is different from that prescribed by the revised code of 1855 for the same offence, and a prosecution is commenced under the law previous to 1855, it is necessary that the prayer of the defendant for punishment under the law of 1855 should appear upon the record, as well as the order of the court changing the punishment. Upon the whole case, we are inclined to affirm the judgment; Judge Leonard concurring, the same is affirmed.

YOUNG *et al.*, Plaintiffs in Error, v. SMITH *et al.*, Defendants in Error.

1. Courts may regulate in their discretion the order in which testimony shall be received; hence it is not error to refuse to permit a plaintiff to read to the jury as evidence in chief portions of a deposition taken by himself, and to reserve the remainder as rebutting testimony.
2. Great latitude is allowed in the cross-examination of witnesses.
3. In a suit against A. and B. as partners, the declarations of A. are inadmissible in behalf of B. to disprove the partnership alleged.
4. Persons may be held liable as partners to third persons, though not as partners as between themselves.

Error to Jackson Circuit Court.

The facts sufficiently appear in the opinion of the court.

Hovey, for plaintiffs in error.

- I. The Circuit Court ought to have permitted the plaintiffs to read a part of Smith's deposition in chief, and to reserve a part as rebutting evidence, because the portion sought to be read was strictly evidence in chief, and the portion sought to be reserved was strictly rebutting evidence, and not necessary

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to the narrative of the witness. (1 Greenl. Ev. secs. 51 and 52; R. C. 1845, tit. Depositions, sec. 29, p. 419; Calhoun v. Hays, 8 Watts & Sarg. 130.)

II. The court below ought to have stricken out all that part of the cross-examination of C. M. Smith commencing at the sixth interrogatory, and from thence to the end of his deposition, because the same was neither a legal cross-examination nor competent evidence in chief for the defence. (1 Greenl. Ev. sec. 448-9.)

III. The acts and conversations of Smith and Huffaker, between themselves or others, were incompetent evidence when offered in defence, because the same were neither a part of the *res gestae*, nor facts of which third persons were presumed to have notice. (Story on Partnership, sec. 63; Winship v. U. S. Bank, 5 Peters, 529; Allen v. Duncan, 11 Pick. 308; Woods v. Clark, 24 Pick. 35.) The defendants could not be witnesses for each other, therefore their unsworn statements, as introduced by defendants, are only the more illegal. (1 Greenl. sec. 329.)

IV. The court below ought to have given the first instruction asked by plaintiffs.

V. The court below ought to have given the ninth and tenth instructions asked by plaintiffs. (Story on Partnership, sec. 63; Dennistown et al. v. Debuys et al. 9 Mart. 26.)

VI. The court below erred in giving the second instruction asked by defendants, because the same is argumentative, and permits the jury to discard evidence upon their own private prejudices outside of the testimony. (2 Starkie Ev. 686; 1 Greenl. Ev. secs. 34, 35.)

Napton, for defendants in error.

I. To determine the order in which testimony shall be received is within the discretionary regulation of the Circuit Court, and unless some manifest injustice has resulted from the exercise of this discretion the Supreme Court will not interfere. It is not easy to see how the merits of this case could have been affected one way or the other by the order

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in which the depositions or portions of them were read. (Rucker v. Eddings, 7 Mo. —.)

II. There was no error in refusing to strike out the cross-examination of Smith. Such examinations are designed to question the veracity or memory or honesty of the witness, or explain or modify or refute his statements, and the greatest latitude is allowed and extraneous and collateral inquiries may be made, subject to the restriction that a matter entirely foreign to the issue can not be inquired into merely with a view to contradict what the witness may testify to on such collateral matter. (1 Greenl. Ev. sec. 448-9; 2 Phil. Ev. p. 726, 733.)

III. The testimony for defendants in relation to the acts and sayings of Huffaker and Smith were legitimate proof. 1st. They constituted the *res gestæ*, and apart from the fact that Smith was a party to the suit, and viewing him as a mere stranger, his acts and declarations were evidence for Huffaker. The material question in this case was, whether a partnership existed between Smith and Huffaker. This was affirmed on one side and denied on the other. The acts of Huffaker and Smith during the period of the alleged partnership, in the course of the trade in which they were certainly engaged, and the declarations of either explanatory of those acts, and contemporaneously made with them, are evidence. They are verbal acts. (1 Greenl. Ev. secs. 108, 109; ib. sec. 171. This is the law of this court: Nolle v. Callaway Co. 11 Mo. —; Turner v. Belden, 9 Mo. —. This is the law of Pennsylvania: Saltmars v. Tompkins, 14 Serg. & Rawl. 280; and of Alabama—Tompkins v. Reynolds, 17 Ala. 109; Thomas v. De Graffanied, 17 Ala. 602; 10 Ala. 430; 16 Ala. 318; 8 Ala. 650; 17 Ala. 362; Hooper v. Edwards, 20 Ala. 582; and of New Hampshire—Plumer v. French, 2 Foster, 450; and of Connecticut—Comins v. Comins, 21 Conn. 413; Russell v. Frisbe, 19 Conn. 205; and of Vermont—White v. Morton, 22 Verm. 15; 7 Wash. —; Holbrook v. Murray, 20 Verm. 525.) 2d. These acts and declarations were legitimate as rebutting testimony.

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(Foster & F. v. Nowlin, 4 Mo. 24; Wilson's Adm'r v. Owens, 5 ib. 40; Wheaton v. Weld, 9 Humph. 773.) 8d. They were legitimate to impeach the witness Smith, who was also a party, and adverse to his co-defendant in fact; (see 1 Greenl. sec. 462;) and even if improperly admitted, they are no ground for reversing the judgment on the last head.

IV. The ninth and tenth instructions asked by plaintiffs and refused by the court raise the same point as the motions to exclude evidence in the progress of the trial, and therefore have been considered already.

V. The first instruction asked by plaintiffs was rightly refused. It was either an abstraction outside the case, or it was calculated to mislead the jury. It was virtually telling them that whatever opinion they might entertain about a secret partnership between Huffaker and Smith (which, as the court will see, was the only point in dispute,) they would still find for plaintiffs. In short, this instruction assumed as a conceded fact a matter about which there was no proof, viz., that Huffaker held himself out to the world as a partner; thus shifting the entire basis of the controversy.

VI. Instruction No. 2, given for defendants, is unobjectionable, as will appear from inspection.

VII. There is nothing in the point relative to newly discovered testimony.

VIII. Smith was not a competent witness. The case of Rich v. Hasson, 4 Sanf., N. Y., 115, under a similar statute, has so decided.

RYLAND, Judge, delivered the opinion of the court.

We do not perceive what injury the plaintiffs below received by the court's overruling their motion to be permitted to read only certain portions of the deposition of the defendant Smith, which the plaintiffs had taken, to the jury as evidence in chief, and afterwards to be permitted to read the balance of the deposition as rebutting testimony. We will not interfere in the discretionary determination of the lower

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court, in such matters, especially where no injury appears to follow to either party. To say the least of this objection to the ruling of the court below, it is captious, and we give countenance to no such practice. The plaintiffs may begin their evidence at either end of the case; but when they offer a deposition and the court holds the same to be legal evidence, then the court may refuse with great propriety to let them pick out and read certain portions at one time, and other portions at a different stage of the trial, to gratify the whim or taste of their counsel.

As to the plaintiffs' second point about the cross-examination of Smith, we do not see how the overruling their motion to strike out certain parts of this deposition can injuriously affect them. Smith was their witness. They gave sanction to his veracity by taking his deposition; and although the plaintiffs are bound, in proof of their case, to confine themselves to evidence relevant to the matters in issue, and the defendants restricted to the same, yet in cross-examinations questions as to collateral facts are often allowed; nor is the rule confining the proof to the allegation strictly followed in cross-examinations, but great latitude of interrogation is permitted at times. In *Lawrence v. Baker*, 5 Wendell, 305, Savage, Ch. Justice, in delivering the opinion of the court, said: "A witness is not to be cross-examined to a distinct collateral fact for the purpose of afterwards impeaching his testimony by contradicting him." (1 Starkie, 134.) There may be cases where great latitude of examination may be permitted, arising from disposition, temper and conduct of witnesses, which can be regulated only by the discretion of the court, and for which it is difficult to lay down a precise rule. We will not therefore disturb the judgment for the overruling of this motion.

The third point taken by the counsel for the plaintiffs in error is fatal to the judgment below. This was a suit against Smith and Huffaker—the plaintiffs contending that Huffaker was a partner. Now it is often the case that the conduct of persons makes them stand liable to third parties as partners,

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when in reality between themselves there is no partnership. In this case the main question in controversy is, not whether Smith and Huffaker were in reality partners trading and doing business as merchants under the name of "C. M. Smith," but whether they so acted, so carried on the business, as to induce third persons to look upon them as partners, to consider them as partners, and trade with them as partners. "There is a just and marked distinction between partnership as respects the public and partnership as respects the parties; and a person may be held liable as a partner to third persons, although the agreement does not create a partnership as between the parties themselves. Though the law allows parties to regulate their concerns as they please in regard to each other, they can not by arrangement among themselves control their responsibility to others; and it is not competent for a person who partakes of the profits of a trade, however small his share may be, to withdraw himself from the obligations of a partner." (3 Kent's Com. 32.) Therefore, when the plaintiffs sued these defendants, it was not competent for them to give in evidence the declarations of Smith that Huffaker was not his partner. Judgment by default had been taken against Smith. Huffaker answered—denied the partnership, the execution of the note sued on, and his liability for the goods. Upon the trial, Huffaker's administrator (he having died after filing his answer) offered in proof the declarations of Smith. These were admitted against the objection of the plaintiffs. These declarations were not made in presence of these plaintiffs, but were in their absence. The court erred in receiving them. They were incompetent; they can not be considered as *res gestae*, as verbal acts. Such testimony would enable a crafty set of men to carry on an extensive operation as partners to the world, but when preparation was about to be made necessary to a failure, then one might withdraw with all the funds and stock, and honest, confiding creditors be met with the assertion "that they never were partners; that there was no partnership," and prove it when sued for their just demands by

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declarations made to and about each other during the time they were seemingly engaged as partners. No such declarations should have been received.

The fourth point made is settled by repeated decisions of this court since the new code of practice. (Rice v. Morton, 19 Mo. 279; 17 Mo. 367; Young et al. v. Croughton et al. and Rankin v. Harper, 23 Mo. 587.)

The fifth point regards the first instruction asked for by the plaintiff. "1st. This being a suit between Thomas Young and others, as plaintiffs, and Constantine M. Smith, and Chas. H. Thornton as administrator of Francis M. Huffaker, deceased, defendants, the jury are not called upon in this suit to settle the matter between said Smith and Huffaker as to whether they were partners or not as between themselves. 9th. All evidence offered by defendants of the admissions of said Smith and Huffaker, or either of their statements to one another as to third persons, when not made in the presence or hearing of plaintiffs, is not competent as against the plaintiffs, and the jury will find accordingly. 10th. The private arrangements or contracts of Smith and Huffaker, offered in evidence on the part of the defendants, or either of them, to which plaintiffs were neither party nor privy, are not competent evidence as against the plaintiffs to disprove the partnership of said Smith and Huffaker."

The refusal of the court to give this instruction we consider was improper. The court ought to have so instructed the jury. It was necessary to place them in possession of the true nature of the case they were trying. They were not trying or settling the question of partnership between Smith and Huffaker so far as they were alone concerned, but whether the facts in proof were not sufficient under proper legal instructions to consider them partners as regarded the rights of third persons. This was error.

The sixth point relates to the ninth and tenth instructions above copied. The substance of these instructions ought to have been given. The ninth has an awkward conclusion which had better have been omitted, and to the tenth there is no legal objection.

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The seventh point, that the court erred in giving the second instruction for the defendants, has nothing in it, and the eighth point only regards the newly discovered evidence, which was not sufficient to authorize the granting of a new trial. It is but cumulative. These are all the grounds relied on here by the plaintiffs' counsel for a reversal of the judgment below, and we have disposed of them in a short and rapid sketch.

The defendants below contend that Smith was not a competent witness for plaintiffs. He is made so under the 11th section of the new code, art. 24. In looking over the whole case, we come to the conclusion that the court below committed error in admitting Smith's declarations, that Huffaker was not his partner, to be given as evidence before the jury. It also erred in refusing the first, ninth and tenth instructions asked for by plaintiffs. The judgment must therefore be reversed, and cause remanded for further proceedings; Judges Scott and Leonard concurring.

SHACKLEFORD, Plaintiff in Error, v. SMITH *et al.*, Defendants in Error.

1. *Young et al. v. Smith et al.*, ante, p. 341, affirmed.

Error to Jackson Circuit Court.

Hovey, for plaintiff in error.

Napton, for defendants in error.

RYLAND, Judge, delivered the opinion of the court.

This case is very similar to the one of *Young et al. v. Smith et al.*, just decided, and to the opinion therein given we refer as settling this. Here the seventh and tenth instructions, together with the first, were refused. The 1st, 7th and 10th are complained of by the plaintiff; in *Young's*

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case the 1st, 9th and 10th. This is about the only difference, except in this case the entire cross-examination of Smith was admitted. Let the judgment be reversed, and cause remanded; Judges Scott and Leonard concurring.

STEPHENS, Defendant in Error, v. HUME *et al.*, Plaintiffs in Error.

25	349
100	96
25	249
142	93
25	349
152	581

1. The first judgment in an action for partition is interlocutory; a writ of error will not lie thereto.
2. Upon a descent cast no entry or actual possession is necessary in order to entitle a husband to courtesy.

Error to Moniteau Circuit Court.

Reuben Hume died December 1st, 1851, seized of certain tracts of land. He left him, surviving, his widow, Elizabeth Hume, and children, of whom Nancy J. Stephens, the wife of plaintiff, was one, and grand-children. An undivided interest in said tracts of one-seventh vested in said Nancy, the wife of plaintiff. At the death of said Reuben Hume, issue of the marriage of the said Nancy and plaintiff was living. The wife of plaintiff died before the institution of this suit. Plaintiff prays that an apportionment of said tracts be made and that a life interest of one-seventh, which he alleges has vested in him as tenant by the courtesy, may be set apart to him.

Defendants, the widow and heirs of Reuben Hume, set up in their answer that the said widow has ever since the death of Reuben Hume remained in possession of the tracts of land described in the petition, no dower having been assigned to her.

The plaintiff demurred to the answer. The demurrer was sustained.

Gardenhire and Morrow, for plaintiffs in error.

I. A tenancy by the courtesy can not be supported by a constructive seizin; there must be an actual seizin in the

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wife during the coverture, the birth of a living child, and the death of both child) and mother during such seizin. (Mer-
cer v. Lessee, 1 How. 54; 4 Kent, Com. 28; R. C. 1845, p.
439, 421.)

Stephens & Vest, for defendant in error.

I. The widow's quarantine does not affect the inheritance of the heirs or any estate incident to it. In point of tenure the widow holds of the heirs, and until the assignment of dower she has no estate in the lands, being neither joint tenant nor tenant in common with the heirs. (4 Kent Com. 62; McClanahan v. Porter, 10 Mo. 751; 3 Marsh. 1113.) Descents with us depend, not on actual seizin, but on the statute regulating descents, and after a descent cast no entry or other act is necessary in order to entitle a husband to courtesy in his wife's land. (Reaume v. Chambers, 22 Mo. 36; Harvey v. Wickham, 23 Mo. 112.)

SCOTT, Judge, delivered the opinion of the court.

This writ of error was prematurely sued out, as there was no final judgment in the cause. This was a proceeding in partition, and in such there are two judgments—the one interlocutory, and the other final. The first is *quod partitio fieri inter partes de tenementis*, upon which a writ or commission goes, commanding that partition be made; and upon the return of this writ or commission executed, if the proceedings are approved by the court, the second judgment is given *quod partitio firma et stabilis in perpetuum teneatur*. This is the principal judgment, and before it is given no writ of error does lie. (Gudgell & Austin v. Mead and others, 8 Mo. 55.) This writ must then be dismissed.

In the case of Reaume v. Chambers, 22 Mo. 54, it was held that the actual seizin of the wife was not necessary to entitle the husband to courtesy. (1 Hill. on Real Prop. 76, 77.) The permission given by the statute to the wife to remain in possession of her deceased husband's mansion house,

Brewer v. Dinwiddie.

and the messuages or plantation thereto belonging, does not affect the right to courtesy. Such possession is not adverse to the heirs of the husband. Writ dismissed; Judge Ryland concurring; Judge Leonard absent.

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25 351
116 471
25 351
128 636

BREWER, Defendant in Error, v. DINWIDDIE, Plaintiff in Error.

1. Where a judgment is regularly rendered against a defendant, the court can not at a subsequent term, there being no irregularity, set the same aside and permit the defendant to file an answer.

Error to Morgan Circuit Court.

J. W. Morrow, for plaintiff in error.

I. The leave to file the answer was tantamount to a setting aside of the judgment by default. No objection being made as to the time of filing the answer, or the answer itself, it was not competent to the court by a mere exercise of arbitrary power to defeat its own action and the rights of the defendant. To grant a party leave to file an answer within sixty days next succeeding the term at which the grant was given, and then requiring him to show cause why the judgment by default should be set aside at the term succeeding the expiration of the sixty days—the answer in the mean time having been filed without objection—is a mere mockery of the administration of the law. The answer shows a good cause of defence.

Ross and Edwards, for defendant in error.

I. The defendant in the court below, Dinwiddie, having suffered judgment to go against him for want of answer, the circuit court did not have authority to set aside that judgment at the succeeding term of the court. The order of the court allowing the defendant to file his answer was void and did not in any manner impair the original judgment, and there was no error in the subsequent action of the court in refus-

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ing to set aside the judgment by default. (Weeme v. Morris, 7 Mo. 6; Barry v. Johnson & Johnson, 3 id. 263; Lecompte and wife v. Wash, 4 id. 557; Keiby & Porter v. Caldwell, 10 id. 392; Field & Cathcart v. Matson, 8 id. 686.)

SCOTT, Judge, delivered the opinion of the court.

It appears from the record in this case that there was a final judgment therein at the October term. Afterwards, at a subsequent term of the court, a motion was filed to set aside this judgment and give the defendant leave to file his answer, which motion was so far sustained as to permit the defendant to file his answer and show cause at the next term why the judgment should not be final. The answer not having been filed within the time prescribed, by an order of the court at a subsequent term the original judgment was confirmed.

Nothing is better settled than that after the term at which a final judgment is rendered, the court can not interfere with it. (Ashby v. Glasgow, 7 Mo. 320; Hill v. City of St. Louis, 20 Mo. 584.) Where there is any irregularity in the proceedings, the court will on motion at a subsequent term—the irregularity being shown to its satisfaction—set the judgment aside, or do whatever the justice of the case may require. But in a proceeding like that under consideration, there is no authority whatever to interfere after the close of the term at which the final judgment was entered.

Judge Ryland concurring, the judgment will be affirmed; Judge Leonard absent.

NEARNS, Respondent, v. HARBERT, Appellant.

25 362
59a 496
25 352
96a 216

1. Where an employee is discharged before the term of his employment expires, the contract price of his services will be, *prima facie*, the measure of the damages received by him from the breach of the contract.
2. The Supreme Court will not grant new trials on the ground that verdicts are against the weight of evidence.

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Appeal from Putnam Circuit Court.

The plaintiff sets forth in his petition that defendant on the 2d day of April, 1856, employed plaintiff for the term of twelve months as an engineer to run his steam saw mill for fifty dollars per month, and agreed also to furnish him, plaintiff, with a dwelling house and fuel for the same time, and to pay his wages monthly; that he commenced work of defendant in compliance with said contract on the 27th day of May, 1856, and continued in his employ, faithfully discharging the duties of an engineer, until July 6, 1856, at which time defendant, without provocation or cause, dismissed him from his employment and thereby prevented him from fulfilling his contract. Plaintiff claimed \$600 damages.

Defendant admitted in his answer the employment of plaintiff as alleged in the petition, but alleged that the hiring was induced by representations made by plaintiff that he was a skillful engineer, well acquainted with the managing and conducting of a steam engine; that plaintiff entered upon the execution of his contract, and was incapable of complying with it by reason of his ignorance of the duties of an engineer; therefore plaintiff discharged him.

The court gave the following instructions asked by plaintiff: "1. If the jury believe from the evidence before them that the defendant employed the plaintiff as an engineer for the term of twelve months, and that defendant discharged plaintiff from his service before the expiration of the twelve months, they must find for the plaintiff the price agreed on for a year's service, unless they also believe that plaintiff was not qualified to perform the services he agreed to perform, or that plaintiff failed or neglected to perform them. 2. It is admitted by the pleadings in this case that defendant did employ plaintiff for the space of twelve months at the price of fifty dollars a month, and also that defendant discharged plaintiff before the expiration of that time."

The following instructions asked by the defendant were given to the jury: "1. If the jury believe from the evidence

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that plaintiff hired himself to defendant as a first class or competent engineer, the defendant had a right to discharge him from his service, and that plaintiff is not entitled to recover in this action. 2. If the defendant hired plaintiff as a first class engineer, and the jury believe from the evidence that plaintiff was not competent to discharge such service as a first class engineer, they must find for defendant. 3. If the jury believe defendant hired plaintiff as a first class engineer, then they must further find that plaintiff was a first class engineer, and that he faithfully discharged his duties as such first class engineer while in defendant's employ, and that defendant discharged plaintiff from his service."

The jury found a verdict for plaintiff and assessed the damages at \$600.

Gardenhire, Morrow and Parsons, for appellant.

Davis, for respondent.

I. The instructions given for plaintiff below were correct. If the party plaintiff was discharged by his employer before the term of his employment had expired, his contract is *prima facie* the measure of damages, unless the defendant had alleged or proved some facts in qualification of the rule. (4 Mo. 44; 15 Mo. 181.)

SCOTT, Judge, delivered the opinion of the court.

All the instructions asked by the defendant were given by the court. There was nothing objectionable in the instructions asked by the plaintiff and given by the court. The measure of damages stated in them for the violation of the contract mentioned in the petition was the correct one. In the case of *Pond v. Wyman*, 15 Mo. 183, the rule is laid down that the refusal of the defendant to permit the plaintiff to perform his contract is equivalent to a performance for the purpose of maintaining an action upon the contract, and the contract price of the services will be the measure of the recovery of the plaintiff unless the defendant by evidence shows that the damages actually sustained are less than the

State v. Berry.

price agreed upon. So, on the other hand, if one is employed by the year at fixed wages, he can not recover any thing for his services if he quits without cause before the expiration of the year. (Schnerr v. Lemp, 19 Mo. 40.) The defendant offered no evidence showing that the plaintiff was entitled to less damages than the measure *prima facie* fixed by law.

When there is evidence in favor of and against the existence of a fact in issue, the circuit court is the proper tribunal to determine whether the verdict of the jury should stand or not. When that court, which has heard the evidence and seen the demeanor of the witnesses whilst testifying, refuses to disturb the verdict, there is no principle on which this court can grant a new trial on the ground that such verdict is against the weight of evidence. This is now well settled.

Judge Ryland concurring, the judgment will be affirmed; Judge Leonard absent.

THE STATE, Respondent, v. BERRY, *et al.*, Appellants.

1. The provision contained in section 11 of article 2 of the act concerning costs, (R. C. 1855, p. 451,) that if the jury fail to declare, in the case of the acquittal of a person indicted, by whom the costs shall be paid—the prosecutor or the county—the court shall render judgment against the prosecutor for costs, is not applicable to cases in which persons had become prosecutors under the revised code of 1845. Where the indictment, with the prosecutor's name endorsed, was pending previous to the taking effect of the revised code of 1855, the tenth section of article 2 of the act concerning costs in the revised code of 1845 (R. C. 1845, p. 249) is applicable.

Appeal from Lawrence Circuit Court.

Hendrick, for appellants.

The statute regulating costs in this case provides that if the defendants are acquitted the jury shall determine and return with their verdict whether the prosecutor or the county shall pay the costs, and requires the court to render judgment accordingly. (See R. C. 1845, p. 249, section 10.)

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This provision does not make the prosecutor responsible for costs, in the event of acquittal, absolutely, but only conditionally. In this case the jury failed to determine whether the prosecutor or county should pay the costs. The statute which requires the name of a prosecutor (see R. C. 1845, p. 866, sec. 22) to be endorsed can not be construed to make the prosecutor liable to pay costs absolutely, but only liable to pay it if the jury, after hearing the evidence, shall so determine. If there was probable cause for the prosecution, the prosecutor ought not to pay costs. If there was no probable cause for the prosecution, he ought to pay costs. It was for that reason the statute gave to the jury discretion to determine whether the prosecutor should pay costs or the county. If the jury fail to determine at all, there is no law authorizing the court to render judgment against the prosecutor, whose liability as prosecutor is only conditional.

Ewing, (attorney general,) for the State.

SCOTT, Judge, delivered the opinion of the court.

Berry could not be made subject to a law passed subsequently to his undertaking as a prosecutor, which changed that undertaking to his prejudice. At the time the defendant became the prosecutor, the statute provided (R. C. 1845, p. 249, sec. 10,) that, "if upon the trial of an indictment, whereon the name of a prosecutor is endorsed as such, according to law, the jury shall acquit the defendant, they shall determine and return, together with their verdict, whether the prosecutor or the county shall pay the costs, and the court shall render judgment accordingly." Afterwards, and before the last trial of the indictment, the foregoing provision was so amended as to provide that if the jury fail to declare by whom the costs shall be paid, the court shall render judgment against the prosecutor for the costs. (R. C. 1855, p. 451, sec. 11.)

It is obvious that the undertaking of the defendant must be controlled by the statute in force when a liability to it was

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incurred. By that statute, in the event of the contingency which has happened, the prosecutor was not liable for the costs. As he was only liable when the jury who tried the indictment determined that he should pay them, and as the jury failed to declare in their verdict whether he should pay or not, it is obvious that no judgment could be rendered against him for the costs. It was not competent for the legislature to make him liable on the happening of an event not contemplated in his undertaking. The court therefore erred in making the act of 1855 applicable to cases in which persons had become prosecutors under the act of 1845.

Judge Ryland concurring, the judgment will be reversed ;
Judge Leonard absent.

DOAN *et al.*, Defendants in Error, v. HOLLY *et al.*, Plaintiffs
in Error.

1. Where several causes of action are joined in the same petition they must be separately stated.
2. It is improper to join in the same petition a cause of action against A. and B. with one against B. alone.

Error to Andrew Circuit Court.

This was a suit on a promissory note for \$5532.03 executed by defendants, Henry T. Walker and Charles F. Holly, and also to foreclose a mortgage executed in behalf of plaintiffs—the members of the firm of Doan, King & Co., the payees of said note—by Holly, one of the makers. Plaintiffs in their petition set forth substantially the execution of the note in their favor by defendants ; that Holly and wife, for the purpose of securing the note, a portion of which was admitted to be paid, mortgaged by deed dated March 18, 1856, certain tracts of land ; that the amount of said note and interest except the credit of \$300 is yet due ; and “they ask judgment for the same with the damages allowed them by law. They further ask that the equity of redemption of

Doan v. Holly.

defendants in and to the mortgaged premises be forever foreclosed, and that said mortgaged property be sold to satisfy the amount due plaintiffs."

The defendants were served with process more than twenty days before the April term, 1857, of the Andrew circuit court. On the third day of the term, no answer having been filed, judgment by default was rendered against defendants. Defendants moved the court to set aside the judgment for the following reasons : 1st, because said judgment being rendered on the third day of the term of the court at which defendants were required to appear and answer said action, and before the end of said term of court the judgment was rendered in violation of law and against the rights of the defendants ; 2d, because said judgment was rendered before the expiration of the time allowed by law to the defendants to file their answer to the action of the plaintiffs ; 3d, because the facts stated in the petition praying for the foreclosure of the mortgage mentioned in the petition do not authorize the rendition of a final judgment foreclosing said mortgage until the next term of the court after a rendition of a judgment by default for want of an answer. The court overruled this motion and rendered judgment against defendants for \$5566, and ordered that the same be levied of the mortgaged property ; and further ordered, that, in case the mortgaged premises were insufficient to satisfy the debt and costs, then the same should be levied of any other goods and chattels, lands and tenements belonging to the said defendants.

Loan, for plaintiff in error.

I. The material question presented by the record in this case is involved in the construction of sections 24, 25 and 26 of article 6 of the code of practice. These sections authorize a judgment at the first term in suits only which are founded solely on a bond, bill or note for the direct payment of money or property. But the petition in this case also asks for the foreclosure of the mortgage. The foreclosure of the mortgage is a matter of substance. (McNair v. Mullanphy's Ex-

Doan v. Holly.

ecutor, 8 Mo. 188.) This case seems to be analogous to the case of Custer v. Pettus, 6 Mo. 497; and the rule of construction adopted in that case will exclude this case from the operation of the 24th, 25th and 26th sections aforesaid.

A. H. Vories, for defendant in error.

I. The only question presented by the record in this case is the ruling of the circuit court in rendering final judgment at its first term. That such judgment is right, see 2 R. C. 1855, tit. Practice in Civil Cases, secs. 24, 25 & 26, p. 1235. The suit really is founded upon the note of defendants, and the mortgage is only an incident thereto—a security for the debt. The mortgage is in contemplation of law a bond for the direct payment of money, and as such stands for trial at the present term. The answer must be filed within the first two days of the term.

SCOTT, Judge, delivered the opinion of the court.

It would always be well if a party before he commences his suit would determine in his own mind what he is suing for. The neglect of this precaution has involved this proceeding in great irregularity. Was this intended as a suit on the note, or as a proceeding to foreclose a mortgage given to secure the payment of the note, or was it thought that it would answer for both of these purposes? If the established construction of the present practice act, which requires that when several causes of action are joined in the same petition, they must be stated in several counts and not all blended together in one count, had not been disregarded, the irregularity of this proceeding would have been glaring. Here are two causes of action united in the same petition. One of these causes of action is against one party, and the other is against the same party and a third person.

Notwithstanding the great liberality of the present practice act in relation to the joinder of actions, it is conceived that there is nothing contained in it which gives the slightest sanction to the joining of actions in which the defendants are not the same, not in part but in the whole. The defendant

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Walker was no party to the mortgage ; why then was he brought into court to contest the proceedings under it ? Was he to be subject to the expense of an action in which he had no concern ? Thousands of dollars might have been spent in this litigation, and if such a course is tolerated as has been adopted in this instance, he would be liable for them. There is but one judgment here and that against both defendants. Being against both defendants, it must be founded on the note, as that is the only cause of action which would warrant a judgment against both of them. Where then is the judgment or authority that will confer a right to sell the mortgaged property ? There was no use in joining an ordinary action on the note with a petition for the foreclosure of the mortgage. Will not the proceedings on the mortgage answer all the ends of both ? If there is service of the process the statute authorizes a general judgment. This, though only irregular and leading to unnecessary length of proceeding, would not constitute a fatal error when the parties to both causes of action are the same ; but it is quite otherwise when the defendants are not all the same, and when there is but one judgment against all of them, as in the present case. The judgment will be reversed, that the parties may amend so as to show for which cause of action they are suing, as both can not be united in one suit. Reversed and remanded ; Judge Ryland concurring ; Judge Leonard absent.

MORIN, Respondent, v. MARTIN's ADMINISTRATOR, Appellant.

1. Where one of two partners pays to a creditor of the firm one-half the debt due from the partnership, the partner so paying will not be entitled to recover of the other partner the sum so paid unless it should appear, upon a settlement of the affairs of the partnership, that such sum is due to him from the partnership.

Appeal from Platte Circuit Court.

Plaintiff, Morin, presented to the probate court of Platte county for allowance a demand against the estate of James

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B. Martin, deceased, of one-half of \$3400, with interest from July 1, 1849, to July 16, 1855, deducting certain items allowed as credits amounting to \$256.50. The claim was allowed in the probate court and an appeal was taken to the circuit court. The cause was submitted to the court sitting as a jury and the court finds the facts as follows: "That in the year 1849, decedent, James B. Martin, and plaintiff owned certain mill property in Platte county, upon which F. B. Martin had a lien for about the sum of \$3400; that Morin became interested in the mill by purchase from J. B. Martin, deceased, and was to extinguish this lien; that on or about November, 1849, plaintiff paid or offered to pay to F. B. Martin's agent the said sum of \$3400, which amount by consent of said agent was left in the hands of said plaintiff and J. B. Martin, deceased, with interest at the rate of six per cent. per annum from the first day of June, 1849; that said plaintiff has since paid or caused to be paid to said F. B. Martin about the sum of \$1600, and that the above item of \$3400 has never been settled between said plaintiff and Martin; and that the plaintiff is entitled to recover of defendant the one-half of the sum last above named with interest from the 1st day of June, 1849, less the amount of credits upon plaintiff's account."

Judgment was accordingly rendered in favor of plaintiff for \$2041.25. A motion for a review was made and overruled.

Gardenhire and Morrow, for appellant.

I. There was an insufficient finding of the facts by the court, and therefore a review of the facts ought to have been had by the court.

II. The finding of the court was against the law and the facts of the case.

III. The probate court had no jurisdiction of the case, and consequently the circuit court could have none by appeal.

IV. The circuit court ought to have reviewed the law and the facts of the case, and granted a new trial, or to have arrested the judgment.

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V. Spratt's testimony ought not to have been heard by the court, for the reason that it was hearsay, incompetent, irrelevant and illegal.

VI. Atchison's deposition ought not to have been read inasmuch as Atchison himself was present and examined.

VII. It does not appear from the finding of the court or the evidence in the cause that there ever was a dissolution of the partnership between the plaintiff and appellant's intestate; therefore this proceeding should have been according to the rules of practice which govern courts of chancery. (Sess. Acts, 1849, p. 428; Sess. Acts, 1847, sec. 4, p. 32.)

Napton, for respondent.

I. The finding of the court, although not embracing all the facts which the evidence discloses, is sufficient to show that the half of \$3400, with interest, &c., was due to plaintiff.

II. The partnership, its dissolution and final settlement, as proved by Spratt, had no connection with the indebtedness sued for and established. It appeared that Morin and Martin paid off their respective shares of the \$3400 mortgage—Morin, through the witness Almond, and Martin, through Paxton; that the partnership was dissolved and settled, no matter how, and consequently that one-half of the \$3400 offered to Atchison and subsequently put into the concern of Martin & Co., at six per cent., was still due to Morin from Martin.

SCOTT, Judge, delivered the opinion of the court.

On whichever side the justice of this case may be when it is understood, it is at least now clear that the facts as found by the court do not warrant the judgment rendered for the plaintiff. He alone, according to the finding, owed the lien of thirty-four hundred dollars. When, then, by arrangement with the agent of F. B. Martin, to whom the sum secured by the lien was due, that sum was deposited with J. B. Martin & Co., Morin, the debtor, was discharged from his individual indebtedness, and became liable for his share of it

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as a member of the firm of J. B. Martin & Co. Being an equal partner, and having paid his share of the debt only, by what principle is he authorized to recover from his partner the amount paid by him? It is as though Atchison, the agent, had loaned \$3400 to the firm of Martin & Co. The firm being composed of two members, if one of them pays his share of the loan, by what right can he claim to recover it from his co-partner, unless on a settlement of the business of the firm it appeared that the amount was due him. The half not paid would be due by James Martin to F. B. Martin, but the evidence was that James Martin paid F. B. Martin his half of the debt of \$3400. The claim of Morin is for money paid for James Martin, when the finding shows that the money paid by Morin was due by himself. If it was claimed by Morin that the money was loaned by him to James and Green Martin to pay the debt of \$3400 due by them to F. B. Martin, then James and Green Martin would be indebted to Morin in that sum. Such would not be a partnership debt of the firm of Martin & Co., and Morin would be entitled to recover it from the estate of James Martin. But neither the claim of the plaintiff Morin, nor the finding of the court, presents any such case; nor can we see how Morin should claim only half of the debt and not the whole of it, unless he had credited Martin for the half proved to have been paid by him—a supposition not warranted by any thing contained in the record, and moreover is inconsistent with the conduct of Morin on the trial, who submitted his case without any evidence of such payment having been made. Besides, such an idea is wholly inconsistent with the written demand of the plaintiff Morin as presented to the court for allowance.

If the claim of Morin is that of a partner against his co-partner, it is obvious that any balance to which he may be entitled, depending on an adjustment of the partnership account, could not be recovered in the form of action he has adopted. It would be impossible to ascertain whether there should be a recovery until an account was taken, an object

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that could only be obtained by a petition in the nature of a bill in equity seeking an adjustment of the concerns of the partnership. We do not perceive the object of the testimony of the witness Spratt; but it is so loosely reported, without any reference to the dates of the events of which he speaks, that it would make it worse than idle to speculate as to the effect it has on the right of the plaintiff to maintain this or any other action against the estate of J. B. Green. Moreover, as the question is nowhere presented by the record, we do not conceive that there is any propriety in giving our views in relation to it.

We do not find any error in admitting the testimony, as we do not see how the defendant was injured by its introduction. Judge Ryland concurring, the judgment will be reversed, and the cause remanded; Judge Leonard absent.

McCLAIN, Appellant, v. WEIDEMEYER, Respondent.

1. Where a negotiable promissory note is drawn in favor of a married woman, she may, with the assent of her husband, legally transfer the same by an endorsement in her own name.
2. This assent is sufficiently shown if it appear that the note, so endorsed by her in her own name, was executed in her favor in consideration of the transfer by her to the maker thereof of a bill of exchange transmitted to her by her husband, absent in California.
3. To constitute a valid transfer by the payee of a negotiable promissory note, it is not necessary that the assignment be by endorsement; a deed of assignment for the benefit of creditors purporting to assign the same is sufficient: such an assignee may maintain an action upon the note in his own name.

Appeal from St. Clair Circuit Court.

This was a suit on a negotiable promissory note executed by defendant, Weidemeyer, in favor of one Martha Thompson. The note was endorsed by said Martha to the partnership firm of Corbin & Barnes. Plaintiff claimed title to said note by virtue of an assignment made to him by Corbin & Barnes

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for the benefit of their creditors. The defendant in his answer set up a failure of the consideration of said note; also that there had been no legal transfer of the note to Corbin & Barnes, the said Martha Thompson being a married woman at the time of the alleged endorsement by her in her own name; also that there had been no legal transfer of the note by Corbin & Barnes to plaintiff.

The cause was submitted to the court without a jury. David B. Thompson, examined in behalf of plaintiff, testified, that he was the son of Martha Thompson, the payee and endorser of the note sued; that John F. Thompson, his father, and husband of said Martha, was in the state of California; that he went to California in 1850 and was still there; that the said note was assigned by Martha Thompson to Corbin & Barnes; that the said note was taken for a bill of exchange sent by John F. Thompson from California to his wife, the said Martha Thompson; that she sold the bill of exchange to defendant, and took the note in controversy in her name.

Plaintiff also offered in evidence the deed of assignment to himself by Corbin & Barnes, for the benefit of their creditors. This deed of assignment purports to transfer and assign to plaintiff "all goods, wares, merchandise, chattels, notes, bills, bonds, judgments, evidences of debt, securities and vouchers for and affecting the payment of money, claims, demands, things in action, and property of every name and nature whatever of and belonging to said firm of Corbin & Barnes." The note in controversy was mentioned and described in the accompanying schedule. There was no endorsement upon said note by Corbin & Barnes.

The court refused to receive in evidence the note and deed of assignment. Plaintiff thereupon took a nonsuit with leave to move to set the same aside.

W. P. Johnson, for appellants.

I. The note sued on was legally transferred to Corbin & Barnes by Martha Thompson, all the evidence tending to show that the bill of exchange was sent to her husband for

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the purpose of being converted into money, and the husband having authorized her by his own act to secure the money on the bill of exchange, there was certainly an implied authority to do any act that might be necessary to realize the money. (17 Mo. 297.)

II. Plaintiff was the legal owner of the note sued on, and became so by virtue of the deed of assignment from Corbin & Barnes, and was the only person authorized to bring suit upon said note. (Practice Act, 1849, art. 3, secs. 1, 2 and 3 ; 14 Mo. 428 ; 18 Mo. 154 ; 18 Mo. 561 ; 19 Mo. 63 ; 22 Mo. 347.)

F. P. Wright, for respondent.

I. There was no legal transfer of the note to Corbin & Barnes. Martha Thompson, the payee, was a married woman. The property thereof immediately upon the execution of the note vested in her husband and he became solely entitled to negotiate it. (Story on Prom. Notes, § 124 ; Story on Bills, § 92 ; 19 Mo. 300.) The legal owner, who was the husband, could alone transfer it. (7 Mo. 548.) Mrs. Thompson could only transfer the note as the agent or by the authority and consent of her husband, and this is neither averred in the petition nor does it so appear in the evidence. Story on Bills, § 92.)

II. There was no transfer of the note by Corbin & Barnes to plaintiff, and the deed of assignment was properly excluded as any evidence of such transfer. The deed of assignment was made in April, 1855. By the statute of 1845, then in force, "all bonds and promissory notes for money or property shall be assignable by endorsement on such bond or promissory note." This statute is different from the statute of 1855, which does not expressly require the assignment to be on the bond or note. Even if the court should think that a transfer in writing upon a different instrument would invest the title in plaintiff, still the deed of assignment was insufficient for this purpose. (Miller v. Paulsel & Newman, 8 Mo. 355.) The law of 1845, respecting bonds and notes,

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was in force at the time of the execution of the deed of assignment. (Webb & Hepp v. Morgan, McClung & Co. 14 Mo. 430.)

SCOTT, Judge, delivered the opinion of the court.

The evidence in the cause was amply sufficient to show the assent of the husband to the act of the wife in assigning the note. In the case of Menkins v. Herenghi, 17 Mo. 297, it was held that the endorsement by a married woman of a bill of exchange payable to her order, in the presence of and with the consent of her husband, will pass the title. The authorities in the case to which reference is made show that the wife with the assent of her husband could legally transfer a note payable to herself by an assignment in her own name.

In the case of Thornton v. Crowther, 24 Mo. 164, the note sued on was with others folded in an envelop, and there was written on it a general assignment of them; the court held that under the practice act of 1849 such assignment was sufficient to enable the assignee to sue in his own name. The law of the case of Miller v. Paulsel & Newman, 8 Mo. 355, is altered by the present practice act.

An order drawn for the whole of a debt is an equitable assignment of it, and he in whose favor the order is drawn may sue for the debt. (Walker v. Monro, 18 Mo. 564; Canefox v. Anderson, 22 Mo. 847.) Judgment reversed, and cause remanded; Judge Ryland concurring; Judge Leonard absent.



WALKER'S ADMINISTRATOR, Plaintiff in Error, v. WALKER,
Defendant in Error.

95	367
101	601
25	367
108	40
25	367
63a	339
25	367
153	658

1. Equitable relief can not be given in a suit asserting a legal right and seeking its enforcement.
2. At law the husband can not make a gift direct to the wife; and though equity, where the intent is clear that she shall enjoy the property granted to her separate use, will in such case interfere and constitute the husband a trustee and compel him to execute the trust, yet the proof of the trust must be clear and unequivocal.

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3. If personal property, other than choses in action, be in such a situation that the husband may, if he will, lawfully take it into his hands at any moment, this is a sufficient reduction into possession, although he should not actually take it into his custody.
4. Where a husband is in possession of personal property bequeathed to his wife by a former husband, as administrator of such former husband, and he makes a final settlement, and it is ordered by the court that he and his wife retain all the estate of the deceased in their hands : *held*, that the husband's possession as administrator ceases, and his possession *jure mariti* commences, at the date of such order ; this would not however be a reduction into possession by him of a bond or note for the wife's money taken by him as administrator.

Error to Cooper Circuit Court.

This is a suit by the plaintiff, the public administrator of Cooper county, as administrator of the estate of Mary Walker, deceased, against Henry R. Walker, her surviving husband. Plaintiff asserts in his petition that defendant is in possession of sixteen thousand dollars in money, notes and accounts, belonging to his, plaintiff's intestate, which he refuses to pay or deliver to plaintiff ; that he is also in possession of certain slaves, jennies, jacks, horses, and other personal property, enumerating it, belonging to said estate, which he also refuses to deliver. Plaintiff asked "judgment for the value of said money, notes and accounts, slaves and other property in defendant's possession belonging to said estate, and to the plaintiff as such administrator, with damages for the wrongful detention thereof."

The defendant answered admitting the possession alleged, but asserting absolute title in himself.

Upon the trial of the cause evidence was adduced showing and tending to show that Mary Walker, plaintiff's intestate, was at the time of her death the wife of defendant Henry R. Walker ; that she intermarried with defendant in the year 1851 ; that at the time of her marriage with defendant she was the widow of Isaac Maston, deceased, who died in 1850 possessed of a large estate, consisting of lands, slaves, horses, mules, jacks, cattle, &c. ; also notes and bonds for money at interest ; that Maston left a will by which, after making sev-

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eral small bequests to his relatives, he devised and bequeathed all the residue of his estate, real and personal, to his wife, Mary, absolutely, and appointed her and Anthony S. Walker executrix and executor ; that they took out letters testamentary and took charge of Maston's estate ; that in December, 1851, the defendant Henry R. Walker married said Mary Maston ; that in July, 1852, said Henry R. Walker was appointed administrator with the will annexed of the estate of said Maston ; that he administered upon the same, and made a final settlement at the April term, 1854, of the Cooper probate court, when an order was made directing that the residue of the estate be retained by said Walker and wife, she being the residuary legatee, and the defendant was discharged from making further annual settlements. Plaintiff's intestate died in April, 1856. It appeared in evidence that the personal property belonging to the estate of Maston was assessed for the years 1852, 1853 and 1854, in the name of plaintiff's intestate, with the assent of defendant ; that for the years 1855 and 1856 it was assessed in the name of defendant, while the real estate was assessed throughout all those years in the name of plaintiff's intestate ; that at the date of the marriage of defendant with plaintiff's intestate, he, defendant, owned a farm in the immediate vicinity of the Maston farm ; that after the marriage the defendant resided at the Maston farm ; that the negroes of the Maston estate were kept separate from those of defendant's farm ; that they were worked separately, living upon the respective farms as before the marriage ; that Mrs. Walker, plaintiff's intestate, directed and controlled the affairs of the Maston farm ; that the negroes and stock on said farm were familiarly known as hers ; that separate accounts were kept of moneys, &c.

The plaintiff asked the court to instruct the jury as follows : " 1. If the jury believe from the evidence that at the time of the commencement of this suit the defendant had in his possession money, notes, accounts, slaves and other personal property of the description stated in the petition, belonging to the estate of Mary Walker, deceased, they must

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find for the plaintiff, and may allow interest on such aggregate value at six per cent. from the commencement of this action. 2. Although the husband by virtue of the marriage is entitled to the personal property of the wife, yet he must reduce it to his possession *as husband* during the marriage, and if he does not it goes to his wife's legal representatives. If therefore the jury believe from the evidence that the defendant did not so reduce his wife's personal property before marriage to his possession during the marriage, but that the wife, from her marriage to her death, had the separate control of it in her own right, independent of her husband, they must find for the plaintiff. 3. Although in the absence of evidence, the possession of personal property by the wife is the possession of the husband, yet if the jury believe from the evidence that Mrs. Walker, from her marriage to her death, had the separate possession and control of the property she had before marriage in her own right, independent of her husband, such possession was not the possession of the husband, and they must, in such case, find for the plaintiff. 4. Even though the defendant had taken possession of the property as Maston's administrator, yet if he held the possession as administrator merely, and the wife took the separate possession and control of property in her own right, independent of her husband, from the close of the administration until her death, such possession could not pass the property to the defendant as husband. 5: Even though the jury may believe from the evidence that the defendant during the marriage took control of the property his wife had at the marriage, yet, if they further believe from the evidence that he did not so take control of it as husband in his own right, but in right of his wife, recognizing her separate right to and separate control of it, such control by defendant was not such possession as passed the property to him as husband. 6. A gift from husband to the wife of her own property after marriage, if a reasonable provision for her, the husband's fortune and circumstances considered, and not prejudicial to credi-

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tors, accompanied by the separate possession, use and control of it by the wife, passes the title to her as her separate property; and such a gift need not be expressly proved, but may be implied from the acts and declarations of the husband. If therefore the jury believe from the evidence that Mrs. Walker had the possession and control of her own property, and that defendant permitted her so to possess and control it, upon a mutual understanding between them that he was to set up no right to it as husband, and that she was to have it as her own separate property, such control and possession were sufficient to pass the property to the wife as a gift, and the defendant could not in such case resume possession and again divest his wife of her property." The first of these instructions was given. The court refused the others.

The court, at the instance of the defendant, gave the following instruction: "1. If the jury believe from the evidence that the property, &c., in controversy was derived from the estate of Isaac Maston, deceased, as a legacy bequeathed to plaintiff's intestate, Mary Walker, late Mary Maston; and if the jury further find that whilst the said Mary was so entitled to said legacy and before the close of the administration of Maston's estate, the defendant intermarried with said Mary, and that afterwards in July, 1852, before the close of the administration, he became administrator de bonis non of said Maston's estate, and that as such administrator he administered the estate until April, 1854, when he made a final settlement in the probate court of Cooper county, and that on such final settlement being made the court ordered that the said property, &c., be retained by him and his said wife Mary, as legatee as aforesaid, then said legacy and property, &c., aforesaid vested absolutely in the defendant as husband of the said Mary, and the plaintiff is not entitled to recover the same or any part thereof from the defendant, and the jury must find their verdict accordingly."

Thereupon the plaintiff took a nonsuit with leave to move to set the same aside.

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Gardenhire, Parsons and *Hening*, for plaintiff in error.

I. The question as to whether the defendant had reduced the property in controversy into his possession as husband was a material question in the cause. The second instruction asked by plaintiff should have been given; for unless the husband did reduce the property of the wife to possession during coverture, he acquired no title, and at her death it passed to her heirs. His possession as administrator was not such a possession as gave him the absolute property. (In the matter of the estate of George Singer, 2 Ashm. 462; 1 Ashm. 331; 12 Vesey, 496; Elms v. Hughes, 3 Dessaus. Ch. 155.) For the like reason the 3d, 4th and 5th instructions of plaintiff should have been given.

II. The 6th instruction should have been given; for even though the husband had had the property distributed, yet if he waived his right to the possession and left it undisturbed in his wife, this was impliedly a gift to her, a surrender of his right to the possession; this would be a gift which the husband would not be at liberty to revoke at pleasure. (2 Story, 839; 2 Swans. 108; 17 Mass. 56; Joshua Gentry, adm'r, v. John McReynolds, adm'r, 12 Mo. 584.)

III. The instruction for the defendant was wrong. The order of the probate court that the husband and wife should retain the property did not *per se* vest the absolute title to the property in the husband. He was bound to reduce the property to possession as husband. (2 Kent Com. 187.)

Adams, for defendant in error.

I. The marriage of the respondent with the plaintiff's intestate passed all her personal property in possession to him absolutely, and gave him the right to reduce to possession all her choses in action at any time during the coverture; and by such reduction to possession he became the absolute owner.

II. The respondent being in possession of his wife's legacy under Maston's will as administrator de bonis non of Maston's estate, held the same as administrator until his final settlement, which occurred in April, 1854. The final settlement

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closed the administration, and he no longer held the possession as administrator, but as husband of the plaintiff's intestate ; and that of itself, without any act of the court, would have vested in him the absolute title. But undoubtedly the order of the probate court having jurisdiction, made at the time of the final settlement, and at the end of the administration, directing him to retain the property, &c., in dispute for himself and wife as legatee under Maston's will, passed such legacy to him absolutely, and is conclusive evidence that he had reduced it to possession so as to become the absolute owner.

III. The possession of the wife is the possession of the husband. They are one person in law, and there can be no separate or independent possession on the part of the wife ; and the instructions asked by the appellant enunciating a contrary doctrine, even if there had been any evidence to support them, were erroneous and properly refused.

IV. No question can arise in this case about separate property in the wife. The petition presents no such question. It is not a proceeding against the respondent as trustee for his deceased wife to enforce the execution of a trust, or to compel him to account for and relinquish property held by him as trustee for the separate use of his deceased wife ; but it is simply an action in the nature of an action of trover, charging him not as trustee, but as a wrongdoer, as having the possession of property to which he has no title either as trustee or otherwise, and to which the plaintiff, as administrator, is legally entitled ; and the plaintiff must stand or fall by the case as presented by his petition. (Link v. Vaughan, 17 Mo. 585 ; Jones v. Baker, 20 Mo. 87 ; Kenedy v. Daniels, 20 Mo. 104 ; Coran v. Johnson, 20 Mo. 431.)

V. But even if this was a proceeding against the respondent as trustee for his deceased wife, in the nature of a bill in equity to compel the execution of a trust, or to compel him to account for and deliver up the trust property, there is nothing in the evidence to warrant any such proceeding, or that tends in the slightest degree to establish a separate

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property or equity in the wife. Every particle of evidence was such as the respondent might have used if he had been plaintiff suing for the property.

VI. An administrator of a deceased wife can not set up a claim to undisposed of separate property in the husband's possession. Where the husband is the trustee and survives his wife, the undisposed of separate property in possession belongs to him at her death *jure mariti*. The separate property in such case being a mere creature of equity for the benefit of the wife, ceases at her death, and the husband becomes the absolute owner of the property discharged of any trust. (Moloney v. Kenedy, 10 Sim. 255; 1 Amer. Lead. Cas. in Equity, 401; Stewart v. Stewart, 7 Johns. Ch. 245.)

VII. But if the wife's administrator could claim undisposed of separate property in the husband's hands, where such claim is founded upon a supposed gift from the husband to her separate use, it must be established by satisfactory evidence of an act constituting a transfer of the property and sufficient transmutation of possession; and the language creating the gift or trust must show that it was for "*her sole and separate use*," or words to that effect. (Clancy on Rights, 260; Walter v. Hudge, 2 Swanst. 97, 112.) A mere delivery to the wife would not be sufficient change of possession. (McClean v. Long, 5 Ves. 79; 19 Mo. 343.) A parol gift from a husband to a wife of a slave is void. (Woodson v. Pool, 19 Mo. 343.) In this case there is no evidence of any gift whatever, much less of a gift to the separate use of the wife. Loose and general declarations (if there had been any such) are not sufficient for the deduction of a trust or to establish a gift. (5 Johns. Ch. 1; Sloan v. Marshall, 2 Wash. C. C. 398.)

SCOTT, Judge, delivered the opinion of the court.

As to that portion of the personal property involved in this controversy, which consists of money, slaves, horses, jacks, jennies, cattle, &c., there is little room to doubt the right of the defendant, both on the merits and on technical grounds. This is an action to recover damages for taking or withhold-

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ing personal property. The plaintiff asserts a legal title to the property sued for. The evidence of that title is an alleged gift of the husband. Now nothing is clearer at law than that the wife can not be the recipient of a gift from the husband so as to vest in her a legal title to the subject matter of the gift. Their unity prevents it. The personal property of the wife at law belonging to the husband, so soon as a gift is made to the wife the gift becomes the property of the husband. (*Faulkner v. Faulkner's Ex'rs.* 3 Leigh, 255; *Clancy on Rights,* 251; 1 Bright on Husband and Wife, 29, 33.) Courts of equity, however, where the intention of the husband is plain that his wife should have to her separate use a portion of his estate, and when the rights of creditors are not in the way, will raise in him a trust when no third person is interposed as trustee, and will compel him, for the benefit of his wife, to execute the trust with which the property may have been clothed. But this trust can not be enforced in an action as setting a legal title to the property designed for the separate use of the wife and claiming damages for its conversion. The gift, or more properly trust, can only be carried into effect through the instrumentality of a petition in the nature of a bill in equity setting forth the facts on which reliance is placed to show that a trust for the separate use of the wife was created, and praying an enforcement of its provisions. But in all such cases, as against the husband, the authorities are united that the evidence of the trust must be clear and unequivocal. (*Clancy,* 260; *Walter v. Hudge,* 2 *Swanston,* 92.) As to the evidence produced on the trial in this cause we do not regard it by any means as sufficient to raise in the husband a trust for the benefit of his wife. The kindness and indulgence of the husband to his wife during her life should not be perverted to his prejudice after her death. His conduct in relation to the estate he derived from his wife is not inconsistent with the idea that he regarded himself as the owner of it. Coming into the possession of the property in the way he did, a kind disposition to his wife would naturally lead him to indulge her in the manner she was

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indulged, when he discovered such was her pleasure. But it would seem that the declarations of the wife herself in relation to this matter, if we are to credit the evidence of them, would satisfy us that she did not contemplate that her control of the property should extend beyond the period of her life.

As to the point that the property, other than the choses in action, never was reduced into possession during coverture, we are of the opinion that it is unsustained by the law arising from the facts of the case. In contemplation of law property is reduced into possession when it is in such a state that the husband can lawfully take it into his hands, if he will. It is not necessary that he should have actually taken it into his custody. If he has a right to do so at his will, it is enough. When no suit at law or equity is necessary to obtain possession of personal property, and the husband may, if he will, take actual possession of it, but fails or neglects to do so, the property is not the less reduced into his possession.

The objection that the property was not reduced in possession must rest either in the idea that it was in the possession of the wife, or that it was held by the husband as administrator. Both of these grounds are untenable. If the property was in the possession of the wife, then the possession of the wife was the possession of the husband. The facts and the law applicable to them do not warrant the assertion that the property at the death of the wife was held by the husband in the capacity of administrator. It had been in the possession of the husband as administrator His wife was the legatee of it. The county court had authority to order the payment of legacies. An order was made that this legacy be retained by the husband and wife, and a final settlement of the administration was made, and a declaration in writing by the defendant and his wife acknowledging the receipt of the amount ordered to be retained was filed among the papers relating to the administration. If circumstances like these are not sufficient to show that property held by one as administrator ceased to be held as such, and was regarded as property held

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in his own right, it is not easy to see how a change of the capacity in which property may be held by the same individual can be effected. (State, to the use, &c., v. Hearst, adm'r, 12 Mo. 365.)

As to the choses in action mentioned in the petition, we are not prepared to say that they are the property of the husband. If any of them were payable to the wife of the defendant, or even given for money belonging to the estate of which the wife was legatee, and made payable to the defendant as administrator de bonis non, the order of the probate court directing such bonds and notes to be retained by the defendant and his wife, was not such a reduction into possession by the husband as is required by the law in order to give the legal right to the husband. If they were afterwards paid during the coverture, or if they were novated by taking a new security in his own name during the wife's life, the case would be different. (2 Kent, 137; Picket v. Everett, 11 Mo. 568.) The cases of Leaky v. Maupin, 10 Mo. 362, and Wood v. Simmons, 20 Mo. 363, show the difference between our law and that of England on this subject. They render it unnecessary at this time to go into an investigation of this question.

As there was some evidence that a bond for the wife's money was taken by the defendant as administrator de bonis non, and as it did not appear but that such bond was still unpaid, and as the instruction given by the court had the effect to exclude such evidence from the consideration of the jury, the judgment will be reversed in order that it may be ascertained whether there were any choses in action to which the wife was entitled and which were not reduced into possession by the husband at the time of her death. Judgment reversed and cause remanded; Judge Leonard absent.

Houck v. Camplin.

HOUCK AND WIFE, Plaintiffs in Error, v. CAMPLIN *et al.*, Defendants in Error.

1. By the law of Kentucky in the year 1830 slaves vesting in a wife, whether in remainder or otherwise, although not reduced to possession by the husband, passed to the husband upon her death in case he survived.

Error to Boone Circuit Court.

Young, for plaintiffs in error.

Adams and Gordon, for defendants in error.

I. The right of succession to the estate of intestates is governed by the laws of the domicil of the deceased at the time of the death. By the laws of Kentucky, which was the domicil of Bostick and his wife at the time of her death in 1830, all her personal property, whether the same had been reduced to possession or consisted of rights in action or interests in remainder in slaves, was vested in him absolutely *jure mariti*. Laws of foreign countries and other states are questions of fact to be proved and found as other facts; and in this case what the laws of Kentucky were was a question of fact, and as such was properly found as a fact by the court, and that finding was warranted by the evidence and fixes the rights of the parties to this controversy. (Story's Conflict of Laws, § 403; 15 Mo. 133; 4 Mo. 446; 7 Mo. 22.) The right to the property in controversy was settled by the judgment and decree of the Fayette circuit court in Kentucky, and that decree vesting the right in Bostwick, under whom the respondents claim, is conclusive between these parties.

SCOTT, Judge, delivered the opinion of the court.

The rights of the parties to this suit accrued under the laws of the state of Kentucky; consequently we must resort to those laws in order to ascertain them. The mother of the complainant, Margaret Houck, had an interest by way of remainder in certain slaves. Pending a suit for their distribu-

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tion in the court of Kentucky, the mother died, leaving her husband as survivor. The plaintiffs assert title through the mother; the defendants claim through the father. The court below found that by the law of Kentucky the interest of the wife on her decease passed to her surviving husband. There can be no doubt of the correctness of this finding.

In whatever light this question may be regarded by the laws of this state, in Kentucky it is well settled that if any interest in a chattel vests in a female before or during coverture, although a particular estate may exist in it undetermined, so that no possession is acquired by the husband during the life of the wife, the right will belong to the husband in case he survives, and pass to his administrator. (Ewing's Heirs v. Handley's Exec'r's, 4 Litt. 348; Irvin v. Divine, 7 Mon. 246; Baker v. Red, 4 Dana, 163.)

In the case under consideration, the rights vested long before the act of the general assembly of the state of Kentucky of 1845-6, by which the interest of the husband in his wife's estate was restricted. The judgment is affirmed; Judge Ryland concurring; Judge Leonard absent.

EDWARDS & WIFE, Respondents, v. WELTON *et al.*, Appellants.

1. One of several *cestuis que trust* can not single out a portion of the trust property and allege an exclusive right thereto, and assert that right in an action for its possession.
2. Where trust funds are misappropriated, the *cestui que trust* may follow the property acquired therewith, and assert the trust as against any one taking with notice.

Appeal from Clay Circuit Court.

This was a suit instituted by William Edwards and Elizabeth Edwards his wife, against Solomon Welton, Ivy Welton and Elvy Atkinson. Plaintiffs state in their petition in substance that one Unice Harness, then a resident of the state of Virginia, made her last will and testament, which was ad-

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mitted to probate in the year 1823 ; that in said will there is the following bequest : " I give to my daughter Elizabeth Welton five hundred dollars, the price of my negro boy Phil, which my son Adam Harness is to have, and pay in two years from my death, and to be laid out in negro girls by my executors for my daughter Elizabeth Welton and her daughters forever ;" that the said sum of \$500 never was laid out by the executors in the purchase of the negro girls for the said Elizabeth Welton and her daughters, as directed by the will ; that said sum was paid by the executors to Michael Welton, the husband of Elizabeth, to be by him laid out in the purchase of negro girls for the said Elizabeth and her daughters according to the terms of said will ; that said Michael received the said sum under an express agreement with the executors that he would so lay it out ; that said Michael did purchase with said \$500, or a part of it, a negro girl named Tamar, for his wife and daughters ; that at the death of said Unice Harness, the said Elizabeth Welton had four daughters, to-wit : Elizabeth, (wife of William Edwards, and plaintiff in this suit), Ivy Welton, and Elvy Atkinson (who, with Solomon Welton, are defendants in this suit), and Hannah Welton ; that said Hannah died about eight, and Elizabeth Welton, the mother, about six years ago ; that at the death of the said Elizabeth Welton, wife of Michael Welton, the said negro slave Tamar, and all her increase, became the sole and absolute property of plaintiffs and the said Elvy Atkinson and Ivy Welton, two of the defendants ; that plaintiffs became entitled to one undivided third of said slave Tamar and her increase ; that on the 24th day of April, 1842, the said Michael Welton made and entered into an instrument of writing between himself and the said Hannah Welton, Ivy Welton, Elvy Atkinson (then Elvy Welton) and Solomon Welton, the son of said Michael, and one of the defendants, in which, after reciting the bequest above set forth, and that he had received the said sum of \$500, and had appropriated it to his own use in the purchase of slaves and otherwise, he conveys certain negroes, named Jerry, Eliza, Essex, Ellen,

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Lewis and Martha, all children of Tamar, absolutely to the said Hannah, Ivy, Elvy and Solomon ; that the said Hannah, Ivy, Elvy and Solomon had full notice of the provisions of the will above set forth ; that they accepted the conveyance for the purpose of defrauding the plaintiffs out of their legitimate rights under said will ; that Michael Welton died in 1855 insolvent ; that they, plaintiffs, have never received the said Tamar or any of her children, or any of the money they or any of them sold for ; that defendants sold two of said slaves mentioned in the bill of sale above mentioned, to-wit : Essex and Ellen, both children of Tamar, Essex for \$300, Ellen for \$210, and appropriated the proceeds ; that the remaining slaves—Jerry, Eliza, Lewis and Martha—have been divided between defendants—Jerry, now worth \$1200, being received by the said Solomon, Eliza by Ivy, and Martha by Elvy ; that plaintiffs, with Elvy and Ivy, were each entitled to one-third of the proceeds of the sale of Essex and Ellen ; that plaintiffs have received none of the proceeds ; that on the contrary the said Solomon received one-third of said proceeds, to-wit, \$170, which rightfully and legally belongs to plaintiffs ; that the said Elvy and Ivy have received each one-third of the remaining negroes after the sale of the said Essex and Ellen ; that they each received one-third of said proceeds of the sale of Essex and Ellen ; that the negro boy Jerry, who legally and properly belongs to plaintiffs, was received by Solomon Welton, and is still in his possession. Plaintiffs ask judgment against the said Solomon for the sum of \$170 and interest, that being the amount received by him from the proceeds of the sale of Ellen and Essex ; and a judgment against him, the said Solomon, for the possession and delivery of the said negro slave Jerry, and in default of delivery of said slave Jerry to plaintiffs, a judgment for the sum of \$1200, the value of said slave. Plaintiffs also ask judgment for \$1500, the alleged value to defendant Solomon of the services of the said slave Jerry.

At the trial evidence was adduced in support of the allegations of the petition. The instructions given are numerous.

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It is deemed unnecessary to set them forth. The jury found a verdict for plaintiffs against Solomon Welton, and found for them \$1100, the value of the slave Jerry, and \$500 for the hire of Jerry; amounting in all to \$1500. The jury found for defendants Ivy Welton and Elvy Atkinson. Judgment was rendered accordingly.

Morrow and Gardenhire, for appellants.

I. Plaintiffs have sued the wrong party. The executors of Harness were the proper parties to be sued. The executors of Harness were guilty of breach of trust, if any one was, and they are undoubtedly liable for that breach, and there is no pretence that they and their securities are insolvent. Even if Harness' executors were insolvent, it would not make the appellant liable. Although the court may hold that the filing of a motion in arrest supersedes a motion for a new trial—which we deny to be the law of the land—it does not affect the question as to who are proper parties to the suit; if the appellees have a judgment against a party who is not responsible to them, the judgment ought to have been arrested.

II. The instructions given for plaintiffs are erroneous, and those asked by defendants ought to have been given.

Hovey, for respondents.

I. The papers offered in evidence by plaintiffs below were competent, as were the statements of Michael Welton before the making of bill of sale of the slaves. (See 3 Vesey, 696, 707; Foster v. Hale, 4 Kent, Com. 305; Lewin on Trusts, 30.) The statements and admissions of Michael Welton, offered to be proven by appellants, were incompetent, because they were in no way explanatory of his act in making the deed of gift or sale to defendants.

II. The instructions as to the admissions by defendant Solomon's answer are warranted by the pleadings.

III. The general instructions given for the plaintiffs are the law of this case. First—Because a trust was created by the will, and the fund, being money, could not be identified

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in kind, but must be traced to such property in the hands of the trustee as answered the description of that in which the trust fund was to be invested. Second—The second and third instructions asked by plaintiffs are well predicated upon the recitals in Michael Welton's deed to defendants as a trace of the fund, coupled with the will creating the fund. Third—Elizabeth Edwards' share of the proceeds of that fund is the only matter in controversy, and if he had her share and no more of it, then being hers she is entitled to it and the value of its use. Fourth—The statute of limitation of action does not run against minors nor married women during these disabilities.

IV. That the instructions asked by defendant Solomon Welton, and refused by the court below, were properly refused. First—Because the court did give other instructions embracing all the points contended for by the defendant below, and even far too liberal towards him. Secondly—No demand was necessary. The recitals in his father's conveyance under which he submitted to and claimed a share in the division of the slaves, was notice to him of the daughters' title as against himself. Thirdly—Solomon Welton was presumed to know the recitals in the conveyance under which he held the slave Jerry. Fourthly—No agreement on the part of Michael Welton was necessary.

V. The motion in arrest was properly overruled. First—Because by the petition Elizabeth Edwards was shown to have been wronged, and that Solomon Welton had wronged her, and she thereby sought redress and general relief. Secondly—By the combination of law and equity in the second count, the jury had a right under the instructions of the court to find for or against any of the parties for any thing and for any amount that was within the wrong complained of or the right sought to be enforced.

VI. The evidence shows that the slave Tamar was bought with the trust fund, and therefore she and her increase went to the daughters on the death of Elizabeth Welton, their mother.

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SCOTT, Judge, delivered the opinion of the court.

This is an attempt by an action in the nature of trover to execute a constructive trust. The prayer of the petition is for the possession and delivery of the slave, and in default of delivery a judgment for his value and his hire. In this aspect of the case, if the facts warranted it, the plea of the statute of limitations was a defence to the action. That the plaintiff Elizabeth was a married woman does not prevent the running of the statute, if she was of age when the action accrued and afterwards married. The disabilities specified in the statute are not cumulative. If a plaintiff, when a cause of action accrues, is laboring under several disabilities, they must all be removed before he is compelled to sue; but if he is subject to one or more disabilities when the cause of action arises, and afterwards another disability supervenes, the suit must be brought within the time limited for the first disability or disabilities. (Keeton v. Keeton, 20 Mo. 530.)

It is obvious that this action has been misconceived, or at least that the plaintiffs have misconceived their rights and have instituted their action in such a way as will not secure the adjustment of the trust by one suit. The trust is a joint one. One of its beneficiaries has no sole or exclusive right to any particular part or subject of the trust. Each beneficiary has a right in every part; and this is the first instance which has fallen under our notice in which one of several joint *cestuis que trust* has been permitted to single out one part of the trust fund, assert an exclusive right to it, and enforce that right by an action in the nature of trover. There is nothing whatever in the record which shows that this proceeding has any sanction in the approbation of the other parties who are interested. The instructions, given at the instance of the defendants other than Solomon Welton, do not help the matter. According to their own showing the plaintiffs were not entitled to more than one-fifth of the value and hire of the slaves in controversy. This fifth would be exclusive of the interest to which they have a right as one of the

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heirs of the mother and sister. As the plaintiffs have been excluded from all participation in a joint trust in which they have an interest, it is obvious that their rights can only be enforced in an action in which the whole trust fund is sought to be adjusted. The other *cestuis que trust* being made defendants, the portions they have received on the taking of an account before a commissioner would be taken into consideration, and the entire property divided or sold so as to do full justice between the parties. The parties who are *sui juris* may arrange matters by consent, but that consent, to avoid future litigation, should be made apparent by the record.

Justice has not been done by the judgment rendered in the cause. The money by the will was to be laid out in negro girls for the "mother and her daughters." These words would constitute the mother and her daughters tenants in common, and upon the death of the mother her share—one-fifth, as there were four daughters—would be distributed among all her heirs. So, on the death of Hannah, her interest would devolve on her mother and her sisters and brothers. All these interests have been overlooked, and the judgment is based on the pretension that the rights of Hannah and her mother survived to the remaining *cestuis que trust*.

The defendant Solomon Welton, taking under the deed, is estopped from controverting its terms. The deed recites that the trust money was appropriated to the purchase of slaves. As only two slaves were purchased, of whom Tamar, the mother of the slave in controversy, was one, it is obvious that he is subject to the trust. The property purchased with the trust money, whether it was of the kind required or not, would be impressed with the trust, if the *cestuis que trust* elected so to consider it.

Solomon Welton, being a volunteer, stands in no better situation than his father, and can not insist on the want of notice. Although the executors under the will are liable to the *cestuis que trust* for the misapplication of the trust fund, if they see proper to pursue them, yet that does not prevent those interested from following the property acquired by

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means of the trust fund into whosesoever hands it may be affected with notice of the trust.

Judge Ryland concurring, judgment reversed, and cause remanded; Judge Leonard absent.

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STEPHENS, Plaintiff in Error, v. SPIERS, Defendant in Error.

1. Though a promissory note given by way of compromise of a doubtful right is valid and binding, it is a good defence that it was obtained through a fraudulent suppression of the truth.

Error to Boone Circuit Court.

This was a suit upon two promissory notes executed by defendant Zephaniah Spiers, in favor of plaintiff, one for \$382.96, dated November 8, 1855, payable December 25, 1855, the other of the same date for \$300, payable January 1, 1856.

The defendant in his answer admitted the execution of the notes, but averred that they were executed by him under a mistake of his rights and because of deceitful representations made to him by the plaintiff, Stephens; that on the 7th day of June, 1847, he, defendant, together with George S. Waters, and others, executed and delivered to plaintiff a note for \$1000; that afterwards, for the purpose of securing this note, and another note for \$929.12 executed in favor of plaintiff by M. R. & R. G. Waters and George S. Waters, George S. Waters mortgaged to plaintiff on the 25th of April, 1848, a certain tract of 240 acres of land in Boone county, Missouri; that various payments were made on said notes, amounting to near six hundred dollars; that in September, 1850, while defendant and his co-obligor, George S. Waters, were in California, the plaintiff sold said mortgaged lands at private sale and in fee simple for \$1500 to Dr. Turner, and received from him, Turner, \$1008 in money, and his (Turner's) note for \$500, payable in twelve months, which last

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note he, plaintiff, has collected ; that he has given no credits on said notes for any part of the sum so paid ; that on the 10th of May, 1851, he, Stephens, after he had sold to Turner and while Waters and defendant were in California, instituted proceedings for the foreclosure of the said mortgage ; that he obtained judgment of foreclosure, and that said land was sold in the year 1852, and he, Stephens, became the purchaser at the sum of \$500 ; that he, Stephens, well knowing that all or nearly all of said notes had been paid, wrongfully and fraudulently instituted suit against defendant on the note for \$1000 which had been discharged as aforesaid, and fraudulently and deceitfully represented to defendant that said note was unpaid, and by such false, deceitful and fraudulent misrepresentation induced the defendant to execute to plaintiff the two notes sued on in the present action, for which defendant has received no value whatever ; that at the time of the execution of the said mortgage by George S. Waters, Waters had been responsible to plaintiff for the said \$1000 note, and that plaintiff had accepted him, Waters, as the payer of said note ; that the note was procured by fraud and was without consideration.

There was evidence adduced tending to support the allegations contained in the answer. The court, at the instance of the plaintiff, instructed the jury as follows : “ 1. If the jury find from the evidence that there was an unsettled debt existing between the plaintiff and the defendant, and that the notes sued on were executed in settlement or compromise of such debt, and that in consideration of the execution of said notes Stephens dismissed a suit which he had brought and was then pending for the collection of the debt aforesaid, they will find for plaintiff the amount of said notes and interest, unless such settlement or compromise was procured by fraud or misrepresentation on the part of plaintiff. 2. If the jury find from the evidence that plaintiff, at the request of defendant, dismissed a suit which he had brought against him, and that the notes sued on were given in consideration thereof, then, although there may have been no foundation for such

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suit, they will find for plaintiff, unless such arrangement was procured by fraudulent representations by plaintiff."

The court, at the instance of the defendant, further instructed the jury as follows: "1. If the jury believe from the evidence that the notes sued upon were executed by defendant without any consideration, they must find for the defendant. 2. If the jury believe from the evidence that the plaintiff agreed to receive from George Waters, in consideration of the note of \$1000, executed by defendant and others, a mortgage upon his land, and did receive such mortgage pursuant to such agreement, and accepted the same in discharge of Spiers' obligation, and that plaintiff afterwards obtained from defendant the notes sued upon by misrepresentations or by omission to give the proper credits or release on the \$1000 note, and defendant was deceived as to his rights and executed said notes without consideration and in mistake of his rights, they should find for defendant. 3. If the jury believe from the evidence that the defendant executed the \$1000 note, given in evidence to plaintiff for goods purchased by defendant from him, and that afterwards defendant sold the goods so purchased to George Waters and others, and that plaintiff agreed to release defendant and receive George Waters or any one else for said note, and did accept other security for such debt, promising to release said defendant, they should find for the defendant, unless they believe that the notes sued on were executed by defendant for a good and valuable consideration other than the said \$1000 note. 4. If the jury believe that defendant, at the time of executing the notes sued on, was not indebted to plaintiff, and was induced by plaintiff to execute the same by false calculations of his rights, and misrepresentations of the amounts due and owing to him, they will find for the defendant. 5. If the jury believe that Stephens released to defendant the \$1000 note in evidence, in consideration that Waters would execute to him the mortgage in evidence, and that the notes now in suit were signed by defendant in liquidation of said \$1000 note under a mistaken view of his rights, induced by the false

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and fraudulent representations of Stephens, they will find for defendant."

The jury found a verdict for the defendant.

Gordon, for plaintiff in error.

I. The notes sued on were given by way of settlement and compromise of a suit which the plaintiff in error had brought in the Boone circuit court against the defendant in error, which was a good and valid consideration for the notes sued on. (10 Mo. 489; 20 Mo. 102.)

II. There was no evidence in the cause to warrant the court in giving the second, third, fourth and fifth instructions asked by the defendant in error. There was no evidence that the plaintiff in error made any false or fraudulent representations, nor was there any evidence to prove that the plaintiff in error made any false calculations or misrepresentations as to the amount which the defendant was owing him. The instructions were calculated to mislead the jury, and ought not to have been given by the court. (10 Mo. 489.)

Young, for defendant in error.

I. Stephens released the defendant from all liability upon the \$1000 note by accepting the mortgage from George Waters, and his withholding from defendant the fact that he had received from Turner \$1500, the price of the mortgaged land by him, and the different sums in the several receipts given in evidence, for none of which he had given credit on either the note for \$1000, executed by defendant, or the \$929.12 executed by M. R., R. G. and George Waters; and his procuring the interest to be calculated on the \$1000 from its date to the day of settlement, at ten per cent. per annum, shows a most glaring fraud in the whole transaction, which authorized the giving of defendant's instructions and the verdict of the jury. (City Bank v. Philips, 22 Mo. 85; Chitty on Con. 643.) The acceptance of the mortgage from Waters, agreeing to discharge Spiers from further liability, was a release to Spiers. (Phelps' Adm'r v. J. & O. Johnson, 8 Johns. 54; Cuyler v. Cuyler, 2 id. 186.)

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II. The evidence in the case conclusively shows that when the notes sued on were executed, defendant was ignorant of the fact that Stephens had released him from the \$1000 note, or that Stephens received the several sums of money before stated, and these facts were concealed from him by Stephens; that Stephens induced him, from the calculations made by Todd, to believe that no part of the \$1000 note had been paid, and that it was still due and owing by defendant, and, by a pretended exhibition of liberality of releasing him from one-half of his liability on the note, fraudulently induced him to execute the two notes sued on. If the evidence in the case warranted the jury in such conclusions, the instructions given for defendant were proper and legal. (See Young v. White, 18 Mo. 98; Brown v. North, 21 Mo. 529; Chitty on Contracts, 589.)

III. The jury had the exclusive right to try the facts of the case, and having found that defendant's pleas were true, and that the notes sued on were obtained by fraud on the part of the plaintiff, there being no error by the court in giving the law of the case, this court will not reverse for such finding by the jury. (See Young v. White, 18 Mo. 98; Goetz v. Ambs, 22 Mo. 170; Holladay v. Atterbury, 22 id. 514; Metz v. Eddy, 21 id. 14.)

SCOTT, Judge, delivered the opinion of the court.

There is no doubt of the correctness of the proposition that a compromise of a doubtful right is a valid consideration for a promise. But this case does not stand upon this proposition. George Waters was a party to the note for \$1000 and became responsible for it. He testifies that in order to release the defendant he executed a mortgage to the plaintiff, who agreed, in consideration thereof, to discharge him from all liabilities then existing against him. This mortgage was accepted by the plaintiff and was enforced by him. Now if a *suppressio veri est suggestio falsi*, the plaintiff acted in bad faith in afterwards suing the defendant upon the note for \$1000, when, for a valuable consideration, he had pre-

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viously released him. If the notes sued upon had been executed in a spirit of compromise upon a full disclosure of all the circumstances affecting the liability of the defendant, they would have been binding upon him. The jury however have negatived this state of facts, and, as they were the proper judges of the matter, we can not interfere with their verdict. It does not appear that the defendant, when he executed the notes sued on, was aware of the inducement which led to the giving of the mortgage by Waters; and the withholding of the knowledge of this fact from him was enough to vitiate the transaction.

After the instructions asked by the plaintiff and given by the court, we do not see with what consistency he can complain of the instructions given at the instance of the defendant. The plaintiff's instructions expressly put his right of recovery upon the freedom of his conduct from fraud and misrepresentation. He can not then complain that there was no evidence of fraud in the transaction which would warrant the instructions given for the defendant. These instructions placed the plaintiff's right to recover on the same ground, with specifications and some amplification adapted to the evidence in the cause. Judgment affirmed; Judge Ryland concurring; Judge Leonard absent.

SHERWOOD'S ADMINISTRATOR, Respondent, v. HILL *et al.*, Appellants.

1. The widow of a testator is a competent witness, in a suit upon the bond of the executor of the will of such testator, to prove the receipt by the executor of money belonging to the estate that had not been inventoried or accounted for.
2. The bond required by law of an executor is broken if he fail to make a complete and perfect inventory of the estate of his testator; his securities will be liable for a failure on his part to inventory and account for money of the testator received by him after the death of the testator and before the granting of the ~~the~~ testamentary.

26	391
108	350
25	391
82	441

*Appeal from Buchanan Court of Common Pleas.***A. H. Vories**, for appellants.

I. Sidonia Sherwood was an incompetent witness. She was incompetent, being a party for whose immediate use and benefit said suit was prosecuted, and who would be entitled to part of the money sought to be recovered.

II. The testimony of the witness David C. Montgomery was not relevant to the matter in issue, and was improperly admitted. The issue being the amount of money received by Gaines, which was the money of Sherwood at his death, and the note of Montgomery being on hand and unpaid at the death of Sherwood, Gaines was bound to make an inventory of the note, and, from what appeared on the trial, he might have done so. Then, if charged with the note and money, there was a double charge against him.

III. Appellants' first instruction ought to have been given. It contained the law applicable to the case, and submitted the question of fact to the jury whether Gaines received the money charged in the petition or any part of it, which was the money of said Sherwood at the time of his death, and failed to account for it.

Loan, for respondent.

I. Mrs. Sherwood was a competent witness. There is no motion for a new trial properly preserved in the bill of exceptions. (R. C. 1855, tit. Witnesses, § 1; 20 Mo. 17.)

RYLAND, Judge, delivered the opinion of the court.

Richard P. Gaines was appointed executor by the last will and testament of Absalom B. Sherwood, deceased. He gave bond as such executor with the defendants, Thomas Henry and Samuel Hill his securities. Gaines died in July or August, 1852, and the plaintiff, Lewis W. Gaines, was appointed administrator *de bonis non* of Sherwood's estate. This suit is founded on the bond of Richard P. Gaines as executor as aforesaid, against his securities, Henry and Hill. The

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breaches assigned are, that Richard P. Gaines failed and neglected to make a perfect inventory of the estate of said Sherwood, deceased—failed to render just accounts; that on or about the 25th day of January, 1853, he, the said Richard P. Gaines, as executor of said Sherwood, received of the money belonging to said estate the sum of three hundred and eighty-five dollars, of which he has hitherto failed and neglected to make any inventory or otherwise account for; that he failed to render just accounts, by not stating in the accounts which he rendered said sum of three hundred and eighty-five dollars received by him as part of said estate, and for which he has wholly and entirely failed to account; that he failed to apply said sum of three hundred and eighty-five dollars received by him as part of said estate to the benefit thereof as required by law. Plaintiff showed his letters as administrator and asked for judgment on the bond.

The defendants answered, admitting the execution of the bond, but denying all knowledge of the matters assigned for breaches thereof by plaintiffs. They state that they were the securities merely.

Upon the trial the plaintiff offered Sidonia Sherwood, the widow of Absalom B. Sherwood, deceased, as a witness; the defendants objected to her as incompetent; the court overruled the objection and admitted the witness. She stated that her husband, at the time of his death, had four or five hundred dollars; that David Montgomery, after Sherwood's death, paid her one hundred dollars; and that before the inventory was made by Sherwood's executor she gave to him three hundred and eighty-five dollars, and also the one hundred dollars paid by Montgomery; that she kept fifty dollars herself. The plaintiff proved by David Montgomery that in December, 1852, after Sherwood's death, he paid to Sidonia Sherwood, widow of said deceased, one hundred dollars, and took up his note from her which he had given to Sherwood. The defendants objected to this testimony, which the court overruled, and admitted the evidence, and the defendants excepted. The plaintiffs proved that a short time before the

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death of Sherwood he had four or five hundred dollars in his house, in a purse in a drawer; the witness (Hartwell Sherwood) stated that he saw the same on the day of the death of his brother, at his house; but whether the same ever was received by Richard P. Gaines he could not tell; that Gaines was at the funeral of Sherwood, and was his father-in-law. The plaintiff proved that the only money inventoried was one hundred dollars in gold and twenty-five cents in silver. This was all that was found when the executor examined the papers and effects of the deceased, as was stated by the witness Gibson, who was called on to help the executor make his inventory. The plaintiff introduced the inventory of said executor, wherein he had only inventoried as cash the sum of one hundred dollars. Witness Reynolds stated for plaintiff that he was one of the witnesses that made the inventory along with the executor; that they only inventoried money on hand amounting to one hundred dollars and twenty-five cents; that if the executor ever received any more than that, he did not know.

The defendants asked the court to instruct the jury as follows: "Unless the jury believe from the evidence that Richard P. Gaines, as executor of Absalom B. Sherwood, deceased, received the money charged in plaintiff's petition, or any part of it, which was the money of Absalom B. Sherwood, deceased, at the time of his death, and failed to account for it, they will find for the defendants." This the court refused to give, and the defendants excepted. The jury found their verdict for the plaintiff for the sum of two hundred and eighty-four dollars and seventy-five cents. Judgment was rendered thereon for plaintiff; defendants moved for a new trial, which being overruled, they bring the case here by appeal.

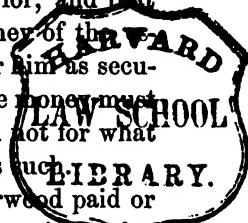
There is nothing in the first point made by the appellants in this court, namely, that Sidonia Sherwood was an incompetent witness. This has been settled by repeated decisions of this court under our new code. (Scroggins & Smith v. Holland, 16 Mo. 419; Stein v. Weidman's Adm'r, 20 Mo.

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17.) These cases settle this point against the defendants below, appellants here.

Nor is there any thing in the admission of the testimony of Montgomery which would authorize this court to reverse. The issue was not alone failing to account for money on hand at the time of the death of Sherwood, but also for failing to render true accounts of money received, &c. But the third point involves more serious matter—that is, the refusal of the court below to give the defendants' first instruction set forth above. The defendants contend that they are liable only for what money Gaines received as executor of Sherwood and failed to inventory or account for, and that they are not liable for acts done by him or money of the estate received by him before they were bound for him as securities in his bond; that to make them liable, the money must have been received by Gaines as executor, and not for what he did before he was qualified and gave bond as such.

The testimony does not show when Mrs. Sherwood paid or handed over to the executor the money—whether it was before he was qualified as such, and executed the bond with the defendants as his securities, or not. She stated that before the inventory was made by Sherwood's executor she gave to him three hundred and eighty-five dollars, and also the one hundred dollars paid by Montgomery. This makes the sum of four hundred and eighty-five dollars proved to have been handed over to the executor. The inventory offered in evidence only showed one hundred dollars and twenty-five cents. Here is a palpable failure to make a correct inventory, and that is one of the breaches assigned in the petition. The condition of the bond is, in part, that the executor Gaines shall make a perfect inventory of the estate of said deceased. This he has not done. He has omitted to state the amount of money he received or which came to his possession by at least three hundred and eighty-five dollars. Then it was not alone for the amount of money which the executor received and failed to account for that these defendants became liable, but they are liable for the executor's



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failure and neglect to make a perfect inventory. The instruction therefore was properly refused. The bond required by law of an executor is broken if he fail to make a perfect inventory of the estate of his testator; therefore money coming to his hands after the death of the testator and before proof of the will or before letters testamentary have been granted, is a part of the estate to be inventoried, and a failure to make such inventory or to put the amount of money so received in the inventory is a breach for which he and his securities may be held responsible on his bond.

This case differs in the facts from the case of *Farrar & Brown v. United States*, 5 Peters, 373, and the case of *The State, to use of Smith, v. Paul's Executor*, 21 Mo. 51. In a case like the present the executor might, if the money came to his hands after the death of the testator, file his affidavit that he did not owe the testator any amount at the time of his death; and if he were not bound to inventory money thus received, a wide door for peculation might be opened, and his bond would afford no protection against such abuses or for such breaches of trust. Upon the whole case, there appears no error, and the judgment is, with the concurrence of Judge Scott, affirmed.

RICHARDSON'S MISSOURI EXPRESS CO., Defendant in Error, v.
P. & B. CUNNINGHAM, Plaintiffs in Error.

1. The fact that an express company, receiving goods from a vendor to be transported and delivered to a vendee upon the payment of the price, renders itself liable to respond to the vendor for the price in consequence of its delivering the goods to the vendee without the payment of the price, will not entitle it to sue the vendee by attachment under subdivision 13 of section 1 of the attachment act. (R. C. 1855, p. 289.)

Error to Cooper Court of Common Pleas.

This was a suit commenced before a justice of the peace by attachment, on the 4th of February, 1857. The following is the statement of the cause of action:

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"St. Louis, March 28th, 1856. Messrs. P. & B. Cunningham to Richardson's Missouri Express Co., Dr. To bill for collection from Ubsdell, Pierson & Co., on one bale goods shipped to Jefferson city this date, and erroneously delivered by our agents, Maus & Lohman, without collecting as received for to U., P. & Co., \$83.90 principal, \$4.25 interest—total, \$87.15."

The affidavit upon which the attachment was based was made under the thirteenth specification or subdivision of section 1st of the attachment act. It set forth that the demand of plaintiff, Richardson's Missouri Express Co., against the defendants, was for the "price of a bale of goods shipped to Jefferson city on the 28th of March, 1856, and there delivered by plaintiff's agents, Maus & Lohman, to defendants, without the defendants paying to said agents the price aforesaid of the same."

The writ of attachment was levied on goods, some of which belonged to Patrick and some to Barnard Cunningham. Upon the trial of the issue raised by a plea in the nature of a plea in abatement, the court, at the instance of the plaintiff, gave the following instruction: "If the jury believe from the evidence that the goods obtained by defendant, B. Cunningham, at Jefferson city, were transported from the city of St. Louis to that point by the Missouri Express Co., from the house of Ubsdell, Pierson & Co., and that the price of said goods, together with price also for transportation, was to have been paid by defendant on delivery of same to them—that he obtained said goods without paying for the same or the charges thereon, and has not since paid, and that said Express Company have become liable to Ubsdell, Pierson & Co. for the said goods—then the jury must find for the plaintiff; provided they further find that P. Cunningham mixed his goods, which were attached, with said B. Cunningham's, to defeat plaintiff in recovering his demand."

The court, of its own motion, gave the following instruction: "2. The court instructs the jury that if the defendants P. & B. Cunningham have mixed the goods attached with the

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fraudulent intent of preventing plaintiffs from making their debt out of B. Cunningham, the jury will find for the plaintiff."

The defendants asked the court to give the following instructions : " 1. If the jury believe from the evidence that the goods in question were purchased of Ubsdell, Pierson & Co., and if the jury further find that there was no assignment of the indebtedness for said goods to plaintiffs, and of which assignment the defendants had notice, the jury will find for the defendants. 2. The jury are instructed that there is no evidence of any assignment from Ubsdell, Pierson & Co. to the plaintiffs of any indebtedness due Ubsdell, Pierson & Co. by defendants. 3. The jury are instructed that there is no evidence of a partnership between the defendants P. & B. Cunningham at the time of the purchase of the bale of goods in question. 4. Although the jury may find that there was a contract between Ubsdell, Pierson & Co. and plaintiffs to deliver the goods in question and to collect the costs and charges thereon, yet the jury must find for the defendants, unless there is evidence that the defendants were parties to said contract. 5. If the jury believe from the evidence that the goods in question were originally purchased from Ubsdell, Pierson & Co., and that they were delivered to the plaintiffs as common carriers for the purpose of being delivered to the defendants, and they were so delivered, the jury are instructed that the plaintiffs can not recover in this action for any thing but the freight upon said goods. 6. The jury are instructed that if they find that the plaintiffs in this case were bailees of the goods in question, and as such delivered them to defendants, the plaintiffs can not recover in this action. 8. The jury are instructed that there is no evidence in this cause that the defendants or either of them ever agreed to pay the plaintiffs any thing on account of the goods in question."

Of these instructions asked by the defendants, the court gave the third. The jury found a verdict for the plaintiff.

Draffen and Hening, for plaintiffs in error.

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I. The defendant in error at the time of instituting this suit had no cause of action against the plaintiffs in error, or either of them.

II. The facts in this case show that this case is not within the provisions of the attachment law. The 13th subdivision of the first section of the law of attachments (R. C. 1855) gives a vendor of goods a right to sue the vendee for the price, where there is a contract between them that the vendee shall pay for the same upon delivery. The Express Company is not the vendor of the goods in question ; it was but a mere agent, for said goods were purchased by B. Cunningham from Ubsdell, Pierson & Co., and therefore no privity of contract exists between the company and the plaintiffs in error, or either of them. If the Express Company agreed with Ubsdell, Pierson & Co. to collect the price of the goods from B. Cunningham upon their arrival at Jefferson city and failed to do so, this would not even give the company any right of action against B. Cunningham until after it paid the price of the goods to Ubsdell, Pierson & Co., and the proper form of action then would be for money paid. (See Smith on Cont. 107-110.)

III. The goods, for the price of which this suit was brought, were sold to B. Cunningham by Ubsdell, Pierson & Co. The goods that were attached belonged in part to P. Cunningham and in part to B. Cunningham, and were entirely a different lot of goods, and it was the mixing of these goods that were attached that the first two instructions refer to. Now if the Express Company ever had any cause of action against B. Cunningham, the same existed almost a year before Patrick Cunningham shipped his goods, and it is difficult to see how the mere shipment of his goods upon the same conveyance with B. Cunningham's goods can give the Express Company a right to sue him for a debt that he had no part or lot in contracting. There is no evidence that Patrick Cunningham knew that Barnard Cunningham owed any person for the goods in question. There is no evidence of any fraud on his part, either as against the Express Company or any other

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persons. The instructions therefore on this point are erroneous, and are not warranted by the law of the land or the evidence in the case.

IV. The Missouri Express Company had no right to sue Barnard Cunningham, much less Patrick, before paying for the goods to Ubsdell, Pierson & Co.; for the case is like that of a security paying the debt of his principal; the payment is the consideration for the promise, and it is absolutely necessary to show payment before an action will lie. (1 Smith's L. Cas. 70-73; Toussaint v. Martinant, 2 T. R. 100; Exall v. Partridge, 8 T. R. 308; 3 Metcalf, 169.)

Stephens & Vest, for defendant in error.

I. B. Cunningham, having by his wrongful act involved the Express Company in a legal obligation to Ubsdell, Pierson & Co. for his own debt to that house, the law implies a contract upon his part to pay the Express Company the amount for which they have so become liable. (Chitty on Cont. 24; 1 Story on Cont. 579; 1 Parsons on Cont. 392-4.)

II. P. Cunningham, having fraudulently mixed his goods with those of his brother for the purpose of defeating a recovery of this debt, became equally liable with him to the plaintiff.

III. The plaintiffs in error having, by their own wrongful acts, become the debtors of the Express Company, instead of Ubsdell, Pierson & Co., the company now have the same rights and remedies which Ubsdell, Pierson & Co. originally had. (Haven v. Foley & Papin, 19 Mo. 632.)

SCOTT, Judge, delivered the opinion of the court.

This being a proceeding under the 13th subdivision of the 1st section of the act providing for suits by attachment, it is necessary that the plaintiff should show itself within the purview of the statute. The words are, "where the debtor has failed to pay the price or value of any article or thing delivered which by contract he was bound to pay upon the delivery." (R. C. 1855, p. 239.) We do not see how, within

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the meaning of the act, the Express Company can be substituted for the vendors of the goods. The question is not whether the company may not sue, but whether it is the party to whom the law has given the remedy by attachment. We do not see that Ubsdell, Pierson & Co. have, by any act of theirs, assigned the contract to the Express Company, even if it were competent for them so to do with the view of entitling it to the remedy by attachment.

We do not know on what principle the instruction given against P. Cunningham can be sustained. There is not the least evidence of a partnership between him and B. Cunningham at the time the goods were sold for which this suit is brought. If, as the instruction assumes, he did mix his goods, which were attached, with B. Cunningham's, to defeat plaintiff in recovering his demand, we do not know on what principle such conduct would have rendered him liable to an action which had accrued a long time previously. Mixing his goods fraudulently with those of another may have affected his right to them, but we do not see how it subjected him to a suit on a demand due a long time before there was any mingling of the goods.

Judgment reversed, and judgment for defendants ; Judge Ryland concurring ; Judge Leonard absent.



STACKER v. COOPER CIRCUIT COURT.

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1. Where a judgment is regularly rendered, it can not be set aside at a subsequent term of the court ; where however it is irregular, the court may at a subsequent term correct the irregularity.
2. After an order of reference in a cause is made, and while it is still standing unexecuted and in force, final judgment in the cause should not be rendered ; if so rendered, the court may, at a subsequent term, recall the same and set it aside.

Application for a mandamus. In his application to the Supreme Court for a mandamus, the applicant, George Stacke, sets forth that he instituted a suit upon an account before a

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justice of the peace against one David Andrews ; that he recovered judgment against the defendant before the justice ; that the defendant appealed to the circuit court of Cooper county ; that at the March term, 1855, of said circuit court, the cause was referred, by consent of parties, to Isaac Lionberger, and was continued for his report until the next term of said court ; that said Lionberger did not make any report at the next September term of said court in accordance with said order of reference ; that at the March term, 1856, the judgment of the justice of the peace was, on motion of plaintiff, affirmed, because the appellant (Andrews) had failed to prosecute his appeal according to law, and judgment was rendered by the circuit court against said Andrews and Jos. L. Stephens, his security in the appeal bond ; that afterwards, at the September term, 1856, the said judgment was, on motion of Andrews, set aside, and an execution issued thereon quashed ; that at the March term, 1857, of said circuit court, 1857, the plaintiff again moved the court to affirm the judgment of the justice of the peace for the reason that the appellant had failed to prosecute his appeal according to law, which motion was overruled ; that the court also overruled a motion for an order to issue an execution on the judgment rendered at the March term, 1856, and refused to order an execution to issue on said judgment. The petitioner prayed that a writ of mandamus might issue from the Supreme Court directed to the circuit court of Cooper county, commanding said court to issue an execution on the said judgment rendered in favor of plaintiff against the said Andrews at the March term, 1856, of said Cooper circuit court, or to show cause why the same has not been done by said court, and for such other and further relief, &c.

Douglass, for petitioner.

I. Mandamus is the proper remedy. (*Boyce v. Smith*, 16 Mo. 317.)

II. The appellant, David Andrews, having failed to prosecute his appeal according to law, it was the duty of the cir-

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cuit court to affirm the judgment of the justice of the peace. (R. C. 1845, p. 244, § 16; Martin v. White, 11 Mo. 214; Starr v. Stewart, 18 Mo. 410.) The judgment of the circuit court affirming the judgment of the justice of the peace was a final judgment rendered at the March term, 1856, and could not be set aside at the subsequent September term. (Hill v. City of St. Louis, 20 Mo. 584; Maids v. Watson, 13 Mo. 544.) If the court, at a subsequent term, had power to set aside the judgment rendered at a former term, it could only be done upon the ground that the judgment was irregular. (R. C. 1845, p. 831, § 8.) The alleged irregularity in this case is that the judgment was affirmed without first setting aside the order of reference. But this order of reference was made at the March term, 1855, and required the referee to report at the following September term. The referee did not make any report in the time limited, because the appellant, whose duty it was under the law of 1849, which governed the case, failed to bring it up before him, and therefore the order of reference had expired by its own limitation, and it was not necessary formally to rescind it. The case was not then out on reference, and the judgment of affirmation was not rendered until one year after the order of reference was made, and six months after the order had expired. But if it was necessary to rescind such order before the judgment could be affirmed, then affirming the judgment did impliedly set aside the order of reference. (Lane v. Kingsberry, 11 Mo. 408.)

SCOTT, Judge, delivered the opinion of the court.

We see no ground in the present application for a writ of mandamus against the judge of the first judicial circuit. Regularly, after the term at which a final judgment is entered, it can not be affected by the court in which it is rendered. But if the judgment is irregular, such as might be recalled by writ of error *coram vobis*, then the court may on motion correct the irregularity. Here the final judgment was en-

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tered when the order of reference was still in force. It will be seen by turning to the act concerning arbitrations (R. C. 1845, p. —,) that the failure of the referees to report within the time prescribed by the order of reference does not vacate the order, or its force is not spent by the efflux of the time ; but the court may by its rule compel the referees to proceed and discharge their duty.

Such a reference as was made in the case out of which this application arose, is not like an arbitration where arbitrators are by agreement selected and required to make their award within a given time. The matter resting altogether on agreement, unless the arbitrators comply with the terms of the stipulation their act can not be binding. But referees appointed by the court are, like jurors, subject to its orders ; and if they fail to comply with an order of reference, the time of performance may be enlarged. After an order of reference has been made, until the order is disposed of no step can be taken in the cause towards obtaining a final judgment. It would be a surprise on a party to *non pros.* him for not prosecuting his suit when there was in existence an order for its reference. The party should either have taken steps to have the order of reference executed, or he should have moved to set it aside and have the cause placed on the docket. As the final judgment was irregularly entered, it was properly set aside. Writ refused ; Judge Ryland concurring ; Judge Leonard absent.

ATKISON, Defendant in Error, v. AMICK *et al.*, Plaintiffs in Error.

1. In order that a constable may, under section 2 of article 7 of the act to provide for the organization, support and government of common schools, (Seas. Acts, 1858, p. 159, and R. C. 1855, p. 1489,) lawfully levy upon a delinquent's goods and chattels, he must first demand the payment of the assessment.

Error to Cooper Court of Common Pleas.

This was a suit originally commenced before a justice of the peace—from whose court the cause was taken by appeal to the Cooper court of common pleas—against one Amick, a deputy constable, and S. D. Smith, one of the trustees of school district No. 5, to recover damages for an alleged illegal levy upon and sale by said Amick, under a warrant issued by the trustees of said district, of a quantity of oats belonging to plaintiff. Defendant justified the alleged wrongful seizure and sale under said warrant. There was evidence showing that the constable, Stoneman, had not made a demand of the plaintiff of the school tax assessed upon him; and there was no evidence showing that Amick, the deputy constable, had made such a demand. The court rendered judgment in favor of plaintiff against Amick for \$21.87.

Douglass and Hayden, for plaintiff in error.

I. The case is governed by the school law of 1853. The school district was established in 1849. Under the law of 1853 it remained as thus established. (See Sess. Acts, 1853, p. 159; School Law, art. 4, § 1.) There was no irregularity in its organization; but if there had been, it was still a district *de facto*, and its validity can not be questioned in a collateral proceeding. (State v. Rich, 20 Mo. 393; Sayre v. Tompkins, 28 Mo. 443; State v. York, 22 Mo. 462; McNair v. Biddle, 8 Mo. 257; Reed v. The Heirs of Austin, 9 Mo. 722.) The trustees had power to assess the taxes (Sess. Acts, 1853, p. 161), and to issue their warrant, and to renew the warrant.

II. The assessment of the tax against the plaintiff, and the issuing of the warrant to the constable for the collection thereof, and the renewal of the warrant, having all been done according to law, the only remaining question in the case is in regard to the demand mentioned in the second section of art. 7 of the school law of 1853. (Sess. Acts, 1853, p. 162.) If it is necessary for the constable to make this demand be-

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fore he is authorized to sell, then, in the absence of any evidence to the contrary, the law will presume that he did make such demand. (1 Greenl. Ev. § 40.) Stoneman, it is true, did not make any demand, but he is not a party to the suit. There is no evidence that Amick did not make a demand. It would be unreasonable to require an officer, in every case, to prove that he had done his duty, and, in many cases, impossible for him to do so. In the absence of proof to the contrary, the law presumes he did his duty, and in this case will presume he made the demand.

III. But the 2d section of art. 7 of the school law of 1853 is merely directory, and therefore a failure to make the demand works no invalidity of the thing done. (1 Kent, Com. 465; Pond v. Negus, 3 Mass. 230; Sprague v. Bailey, 19 Pick. 436; Rector v. Hart, 8 Mo. 448; Whitney et al. v. Emmet et al. 1 Baldw. C. C. 316.)

Stephens & Vest, for defendant in error.

I. As the proceedings of the trustees were *ex parte* and summary, the law under which they were had must be strictly pursued; and as they set up that law in this case as a defence to the action of Atkison, it devolves upon them to show that all the pre-requisites of the law were complied with before his property was sold. Although as a general rule it is true that public officers are presumed to have done their duty until the contrary is shown, still such proceedings as this sale—*ex parte*, summary and against common right—are exceptions, and in these it devolves upon the party shielding himself behind them to show that he has pursued the law strictly, and complied with all its requirements. (See Morton v. Reeds, 6 Mo. 64.)

II. Amick had no right to sell any property of Atkison's until after a demand; and as he has failed to show any demand made, but that in fact there was none on the part of the constable of the township of whom he was the deputy, he was then a trespasser in making the sale, and the same was void. Yet if the sale was not *ipso facto* void, still Atkison

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is entitled to damages. (*Hobein v. Murphy*, 20 Mo. 447; *Hobein v. Drewell*, 20 Mo. 450.)

RYLAND, Judge, delivered the opinion of the court.

The only point in this case necessary for our decision involves the authority of the constable to sell the plaintiff's property. There is nothing in the record except this which requires any notice from this court. So far as regards the organization of the township and district, the election of trustees, and the assessment of taxes, and issuing of the warrant, and the renewal of the same, we pass over without comment, further than to say, in the whole case, so far as these matters are involved, there is nothing demanding any decision of this court on account of errors therein.

The 2d section of article 7 of the "Act to provide for the organization, support and government of common schools in the state of Missouri," approved February 24th, 1853, and which took effect from and after the first day of November, 1853, and the 2d section of art. 7 of the act on the same subject, approved December 12, 1855, (R. C. 1855, p. 1439,) are the same, and as follows: "In case any person refuses to pay his or her liabilities, under the provisions of the act, *upon demand of the constable*, he shall have power to levy on the goods and chattels of such delinquent, and sell the same in the same manner as provided for executions issued by justices of the peace." This section gives the power to the constable to make the levy and to sell, and it is the only one that does give to him the power. Now it is manifest that the legislature did not confer this power to be exercised at the will of the constable; he was authorized, empowered, in case any person refused to pay his liability under this act, *upon demand* of the constable, to levy and sell. He had no power to levy and sell without first demanding the amount assessed and mentioned in his warrant, and the party refusing to pay the liability. This section is not merely directory; it confers power only in certain events. When, therefore, the constable attempts to justify his act of levying and sale under the

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warrant of the trustees, he must go further than merely to show his warrant; he must prove that he made the demand contemplated by the statute, and the refusal or neglect of the person liable to pay the amount of his liability, or he fails in his defence. The power of levying and selling a person's property, when given by statute in certain events, or upon a certain state of facts, must be construed strictly; and the officer exercising this power must look to it that the events have happened, or the state of facts exists, otherwise he will be liable. The judgment must be affirmed; Judge Scott concurring.

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SMITH'S ADMINISTRATOR, Defendant in Error, v. ROLLINS *et al.*, Plaintiffs in Error.

1. A sheriff made the following return of service of process: "I do hereby certify that I served the within petition and writ on the within named A. B. by delivering a copy to the wife of the said A. B., over sixteen years of age, on this," &c. *Held*, that the return was defective in that it did not appear that the copy was delivered at the usual place of abode of the defendant.
2. The fact that the defendant, A. B., when the cause was called for trial and he was called into court, appeared and objected to the court's proceeding with the cause on the ground that he had not been served with process as required by law, is not such an appearance as would make a judgment by default against him regular.
3. Where there is a defective service of process upon one of several defendants, he is entitled to have a judgment by default against him and his co-defendants jointly set aside. Being an entire thing, it must be set aside as to all the defendants.

Error to Moniteau Circuit Court.

This was a suit against David E. G. Rollins and others upon a promissory note for \$250. The following is the return of the service of process by the sheriff: "I do hereby certify that I served the within petition and writ on the within named David E. G. Rollins, Alexander R. Nelson, Edwin H. Daggett and William McKissick, by delivering a copy to the said A. R. Nelson, E. H. Daggett and William

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McKissick on this 28th day of August, 1856, and by delivering a copy to the wife of the said D. E. G. Rollins, over sixteen years of age, on this 6th day of September, 1856, in Moniteau county. Given under my hand this 8th day of September, 1856. [Signed] Stephen Howard, sheriff Moniteau county, Mo."

At the return term, no answers having been filed in behalf of defendants, a judgment by default was rendered against them. A motion was made in behalf of Rollins to set aside this judgment by default on the ground that there had been no legal service of process upon him, Rollins. The court overruled the motion. It appears from the bill of exceptions that "on the trial of the above entitled cause, at the return term of the writ issued in said cause, when the cause was called for trial, the said defendant Rollins, being called into court, objected to proceeding in said cause because he had not been served with process as required by law; but the court proceeded to render judgment by default in said cause; and thereupon the said defendants filed a motion to set aside said judgment," &c.

Edwards, for plaintiffs in error.

I. The return of the sheriff as to the service of the writ did not authorize the court to render judgment against Rollins, and the judgment, being against all the defendants jointly, is void as to all. The service on Rollins is by leaving a copy with his wife; where it was left the sheriff does not state. (See R. C. 1855, p. 1223, § 7.)

Parsons, for defendant in error.

I. The co-defendants of Rollins not having filed a motion to set aside the judgment rendered against them, the judgment of the court below must stand against them.

II. The defendant Rollins was in court at the time of the rendition of the judgment; for it appears by the record that after rendering judgment thereupon Rollins moved to set it aside on the same day and at the time it was entered, for the

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statement of his motion is a part of the judgment. He made no objections until after judgment rendered.

III. Nothing appearing to show that any error was committed materially affecting the rights of the plaintiffs in error, the judgment ought not to be reversed.

SCOTT, Judge, delivered the opinion of the court.

The defendant Rollins being impleaded with others, a judgment by default was taken against him on a service of process which was in the words that follow: "I do certify that I served the within petition and writ on the within named David E. G. Rollins by delivering a copy to the wife of the said D. E. G. Rollins, over sixteen years of age, on this 6th day of September, 1856, in Moniteau county." The statute directs (R. C. 1855, p. 1223) that one of the modes of service of a summons shall be by leaving a copy of the petition and writ at the usual place of abode of the defendant, with some white person of the family over the age of fifteen years. It will thus be seen, upon a comparison of the language of the return with that of the statute, that the return is defective in not stating that the copy was left at the usual place of abode of the defendant. This requirement of the law is essential to the validity of the service. A person may be a member of a family and yet a long time absent from the abode of that family, which might prevent the head of it from receiving the notice. Though the defendant was present in court, yet his appearance was not entered on record, and he had a right at the time to object to the judgment by default as he had not been served with process the length of time necessary to entitle the plaintiff to a judgment against him. The case of Whiting & Williams v. Budd, 5 Mo. 443, was correctly decided; but the dictum as to the length of time that should intervene between the appearance and the entry of the judgment by default can hardly be reconciled with the statute, which prescribed the notice a party should have before he should be required to plead an action.

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As the judgment was irregularly entered, the defendant had a right to have it set aside without the imposition of any terms. He was not in default—was seeking no favor from the court; and nothing could be required of him as a condition to the setting aside of the judgment.

There is nothing in the objection that the motion was made in the name of Rollins alone, without the concurrence of the other defendants. This was at most a clerical error, if it was error at all, as the entry responding to the motion would have been in the name of all the defendants. A judgment being an entire thing, can not be reversed in part; but the whole should be set aside where there is error or irregularity in any part of it. (*Rush v. Rush*, 19 Mo. 441.)

If the fact warranted such a course, it is strange the plaintiff did not call upon the sheriff and have him amend the return to the writ, which would have deprived the defendant of the benefit of his motion.

Judge Ryland concurring, the judgment will be reversed, and the cause remanded; Judge Leonard absent.



FOLDEN, Respondent, v. HENDRICK, Appellant.

25	411
108	304
25	411
90	482

1. If a slave give a watch to his wife, who is owned by another master, a third person, who obtains possession of the watch wrongfully, will not be permitted to deny the validity of the transfer in a suit brought against him by the owner of the wife, to recover its value—the owner of the husband not objecting to the disposition made by his slave of the watch.
2. In a suit to recover the value of property wrongfully converted, it is too late to object for the first time in the Supreme Court that no demand was made.
3. The Supreme Court will not reverse a judgment for a refusal of a court to give an instruction to the effect that, "admitting all the testimony to be true, the plaintiff can not recover."

Appeal from Greene Circuit Court.

This was a suit commenced before a justice of the peace to recover the value of a watch alleged to have been wrongfully taken from the possession of plaintiff. Upon the trial in the

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circuit court, to which the cause was taken by appeal, the plaintiff introduced the following testimony : One G. Philips, examined in behalf of plaintiff, testified, " that some time before the commencement of the suit, in the spring of 1855, he, witness, as constable, had apprehended a negro man belonging to one Huralston for supposed offences, and while the negro was in his custody a company purchased him for the purpose of carrying him off ; witness understood from defendant that he went to the negro man's wife, who belonged to plaintiff, to get the negro man's clothes, and she gave them to him ; witness also understood from defendant that he got the watch from the possession of plaintiff—that is, defendant told him that the negro woman handed him the watch after giving him the clothes ; she gave defendant the watch as the property of the negro man, and the defendant received the watch from the negro woman to be carried to the negro man. Witness said defendant took the watch and offered it to the negro man, saying he had a watch himself and his partner ought to have one too, and asked the negro if he wanted one ; but the negro man did not take the watch, and the last witness saw of the watch it was in defendant's possession. The negro woman was plaintiff's house-keeper and servant, and wife of the negro man. Plaintiff also introduced one Woodward as a witness, who testified that he saw defendant offer the watch to the negro man, but the negro man did not receive it, and the last he saw of the watch it was in defendant's possession. Witness said he saw that same watch, some time before that, in the possession of a young man, nephew of plaintiff, by the name of Stotts ; that Stotts was offering to sell it, and claimed it as his own ; thought the watch was worth from sixteen to eighteen dollars." . The above was all the evidence introduced.

The defendant asked the court to instruct the jury that, admitting all the testimony to be true, the plaintiff can not recover in this cause. The court refused so to instruct. The court instructed the jury " that notwithstanding Hendricks got the watch from the negro woman of Folden, yet if they

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believe from the evidence that it was in Folden's possession, they ought to find for the plaintiff." The court also, at the instance of the plaintiff, gave the following instruction : "The possession of the watch by the negro woman is Folden's possession, unless it had been proved that she got possession of the watch wrongfully." The court refused the following instructions asked by defendant : " 1. Although the watch was taken from the negro woman, Folden's slave, unless Folden had possession the jury must find for the defendant ; the negro's possession is not of itself possession in Folden. 2. Unless plaintiff has proved that Stotts placed the watch in the possession, the jury are bound to find the issues in favor of the defendant. 3. There is no evidence before the jury to prove that Stott placed the watch in Folden's possession." The jury found for plaintiff.

Morrow, for appellant.

I. The instruction asked by the defendant at the close of plaintiff's testimony ought to have been given. There is not a tittle of proof that the plaintiff ever owned or had possession or the right to the possession of the watch. On the contrary the proof shows, *prima facie*, title to the watch in Stotts. There was no demand and refusal. (2 J. J. Marsh. 86 ; 7 Dana, 248 ; Danley v. Rector, 5 Engl. 211.) The principle of the instruction in this case would give the owner of a negro's wife the right to all the clothes, boots and blankets that the owner of the negro man might furnish him.

II. The instructions asked by plaintiff ought not to have been given, and the instructions by the defendant ought to have been given. Although the possession of the slave may for some purposes be regarded as the possession of the master, yet it can not be said that such possession is conclusive evidence of title, or even *prima facie* evidence of title, where the right to possession is in dispute. If the plaintiff had been indicted for larceny, would the possession of the watch by his slave be any evidence against him without other proof? The court bases the whole case upon the fact that the

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possession of the slave is the possession of the owner of the slave, and that bare possession is conclusive evidence of title. The first instruction given by the court for plaintiff refers a matter of law to the jury.

Wright and Otter, for respondent.

I. What is earned by the slave, or otherwise rightfully belongs to the slave, belongs to the master by the common law, the civil law, and the recognized rules of property in the slaveholding states. (*Law of Slavery*, 229.) A master may sue for what is due his slave, and he can claim the benefit of a lawful and voluntary engagement made in favor of his slave. (*Livander's heirs v. Ton et al.* 8 *Martin*, 161; *Law of Slavery*, 268.) The slave, in acquiring property, acts in legal contemplation as the agent of the master. (*Law of Slavery*, 228; 1 *Hill*, 270.) It follows then as a consequence that the possession of the slave is the master's possession. (*Law of Slavery*, 6.) The possession of personal property is evidence of ownership, nothing appearing to the contrary; consequently the instructions for plaintiff are correct.

SCOTT, Judge, delivered the opinion of the court.

There is no doubt of the principle that the property of the slave belongs to his master. Whatever a slave acquires a right to, the master may sue for and recover in his own name. If a thing belonging to a slave is stolen, it must be alleged in an indictment for the felony that it was the property of the master. But while this is certainly the law, if masters do not interfere with nor object to the disposition that their slaves may make of the property which they are willing should be owned by them, it is not for strangers to interfere and deny the validity of any transfer of his property which a slave may make. The watch being the property of the negro man, he gave it to his wife. What is more natural than that a man about to be separated from his wife, should be willing to give her a portion of the property he may have? What possible inference can be drawn from the refusal of the man to re-

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ceive the watch, but that it was his wish that his wife should have it? The master of the slave not objecting to this disposition of the property, who else shall gainsay its validity? These being the facts of the case, as may be inferred from what is stated in the record, it is clear that justice has been done by the judgment rendered in the court below. The wife has obtained what her husband gave her, or at least its equivalent.

This court is no place in which, for the first time, to make the objection of a want of demand. If the objection had been made in the court below, it might have been obviated. After a party has resisted a recovery against him in all the courts, from the lowest to the highest, it is with a bad grace that he appears in the court of the last resort, and for the first time makes the objection that there was no demand made of him before the institution of the suit. Such conduct looks very much like giving up the controversy.

As to the instruction refused at the close of the case, we are of opinion that it was a proper exercise of the discretion of the court to refuse it. The instruction was so general that it did not show on what point the party relied. If there was any fact not proved which was essential to a right of recovery, why was it not singled out and a direction prayed that the proof of such fact was necessary to entitle the plaintiff to a verdict? With the statute before us, which enacts that no exception shall be taken on an appeal or writ of error to any proceeding in the circuit court, except such as shall have been expressly decided by such court, we will never reverse a judgment for the refusal of so general an instruction. Under such instructions the court below might have been of the opinion that one essential fact was not proved, while this court may come to the determination that the defect of proof was not in relation to that fact, but a different one; or the court below may hold that a fact is necessary to be proved which, in the opinion of this court, is unnecessary, or that there is a variance between the proof and the petition. How, under such instructions, could this court ascertain the point

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decided by the court below? Under such circumstances would not a reversal of the judgment be against the spirit of the act cited? Would it be known that the point decided by the court below is the same as that decided by this court? The law, in its anxiety to protect judgments from reversals, requires that the specific question decided below should be that on which the opinion of this court will turn; and if instructions so general in their character are countenanced, the statute will be entirely evaded. At an early day this court felt the embarrassment of instructions of so general a nature, and pointedly condemned them. (Williams v. Harrison, 3 Mo. 412.)

The second instruction asked by the defendant was intended, it is presumed, to raise a question of variance between the statement of the cause of action and the evidence. If the property was Folden's, as the evidence conduced to show, it was not material from whom it was obtained. The allegation respecting Stotts' possession must have been designed for its identification, and if it was otherwise sufficiently described, it was enough. This is not a matter of contract. No form of pleading is required in justices' courts. No statement of the cause of action is necessary, save that which the justice is required to enter on his docket. Statements, when filed, are often very inartificial, and should be favorably construed. There is nothing in the record showing that any question was raised as to the identity of the cause of action tried in the justice's court with that tried in the circuit court. The cases of Link v. Vaughn, 17 Mo. 595, and Ferrara v. Beck, 19 Mo. 30, were actions in courts of record, and under the present practice act, which, by express provision, does not extend to justices' courts except in relation to the matter of evidence. Judge Ryland concurring, judgment affirmed.

Crow v. Harmon.

25 417
87a 483

CROW, Defendant in Error, v. HARMON, Plaintiff in Error.

1. An instrument in the following form—"I promise to pay G. W. Crow one hundred dollars if the M. T. Lewis county road is not opened and kept open along the creek where it is now located, or if said Crow should make null the present proceedings of the court and commissioners as already had and done by them. I also agree that if said road is opened and kept open that said Crow shall have all the damages that may ever be assessed me for the same. February 7, 1855. [Signed] Jacob Harmon"—is within section 1 of the act concerning bonds and notes, (R. C. 1845, p. 189,) and imports a consideration; it is not champertous on its face.

Error to Holt Circuit Court.

This was a suit upon the following instrument in writing: "I promise to pay G. W. Crow one hundred dollars if the M. T. Lewis county road is not opened and kept open along the creek where it is now located, or if said Crow should make null the present proceedings of the court and commissioners as already had and done by them. I also agree that if said road is opened and kept open that said Crow shall have all the damages that may ever be assessed me for the same. This February 7, 1855. [Signed] Jacob Harmon."

The plaintiff in his petition set forth the execution by the defendant of the above instrument, and alleged further that "the said road was not opened and kept open along the creek where it was located, but that the county court of Holt county, Missouri, has refused to open the same."

At the trial the plaintiff read in evidence the above instrument, and rested. The defendant then, to show that damages had been assessed to him on account of the opening through his land of the M. T. Lewis county road and the amount of damages assessed, offered in evidence the records of the proceedings of the Holt county court had June 4, 1856, as follows: "Now here, in the matter of Martin T. Lewis and others—petition for county road—the court not deeming the road of sufficient utility to justify the payment of \$285—that being the amount of damages awarded to Ja-

Crow v. Harmon.

cob Harmon by a jury of six men—the court refuses to establish said road, and hereby rescinds a former order appointing Martin T. Lewis overseer on said road and ordering him to open the same.” The court, at the instance of plaintiff, rejected the transcript of said order. This was all the evidence adduced. The court, at the instance of the plaintiff, instructed the jury as follows: “1. The jury will find for plaintiff one hundred dollars and interest thereon at the rate of six per cent. interest per annum from the time the same was demanded. 2. The pleadings admit that such demand was made on the 22d day of October, 1855.” The court refused the following instructions asked by defendant: “1. Unless the jury believe from the evidence that said instrument of writing was executed on some good or valuable consideration, they will find for the defendant. 2. The agreement sued upon does not show any consideration, nor does it import one. The instrument of writing sued on is void, being against the policy of the law.”

Foster, Vories and Loan, for plaintiff in error.

I. The instrument of writing is champertous, void and contrary to public policy.

II. The instrument of writing sued on does not import a consideration and the petition fails to allege one. The plaintiff gave nothing for defendant’s undertaking; no services were contracted for, and, so far as the pleadings show, none were rendered; the plaintiff has been put to no loss, inconvenience or trouble; nor has the defendant derived any advantage from the contract.

Hall and Gardenhire, for defendant in error.

I. We do not see how the instrument sued on can be champertous. It does not show that Crow supplied money to carry on any suit on condition of sharing in any land or other property gained by it. (1 Bouv. Dic. 218; 2 Parsons on Cont. 262; 1 Pick. 416; 5 John. Ch. 44.) It does show a promise in writing, signed by Harmon, to pay one hundred dollars if a certain road was not opened and kept open, or if

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Crow should make null certain proceedings of the court and commissioners. Such a promise is certainly free from objection. The instrument also shows that if the road was opened and kept open, Crow was to have all the damages assessed. Harmon certainly had the right to give Crow all the damages or none for his services, as he chose. But this last matter can not come up here; for the petition alleges that the road was not opened or kept open, and the answer not denying admitted it. It was upon this ground that the court below excluded defendant's evidence showing that damages had been assessed.

II. The instrument sued on imports a consideration. It is in writing, made and signed by Harmon, and contains a promise to pay Crow a sum of money therein mentioned. (1 R. C. 1855, p. 319, § 1; Caples v. Branham, 20 Mo. 244.)

SCOTT, Judge, delivered the opinion of the court.

This was a suit on a promissory note, and the objections to a recovery were that the consideration was against public policy, being champertous, and that it was without consideration.

The first section of the act concerning bonds and notes (R. C. 1845, p. 189) provides that all notes in writing made and signed by any person or his agent, whereby he shall promise to pay to any other person or his order or unto bearer any sum of money or property therein mentioned, shall import a consideration and be due and payable as therein specified. The note importing of itself a consideration, the burden of proving a want of consideration was upon the defendant. No evidence was given by him showing a want of consideration for the note, and therefore his objection was properly disregarded.

As to the objection that the contract was champertous, it may be answered that there is nothing on the face of it showing that it is obnoxious to such an imputation, nor was there any evidence in support of it.

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The defendant was not prejudiced by the refusal of the court to admit the record of the county court as evidence, as the effect of it was only to sustain the plaintiff's case. Judgment affirmed; Judge Ryland concurring; Judge Leonard absent.

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THE STATE, Appellant, v. MITCHELL, Respondent.

1. An indictment, founded on section 28 of article 8 of the act concerning crimes and punishments, (R. C. 1845, p. 404,) charging that the defendant did "wilfully and contemptuously disturb a *congration* of people met for religious worship," &c., is bad.

Appeal from Laclede Circuit Court.

William Mitchell was indicted, under section 28 of article 8 of the act of 1845, for disturbing religious worship. The indictment is as follows: "The grand jurors for the state of Missouri, empanelled, charged and sworn to inquire for the county of Laclede aforesaid, upon their oath present that William Mitchell, late of said county, on the tenth day of August, in the year of our Lord 1854, at the county of Laclede aforesaid, did then and there wilfully and contemptuously disturb a *congregation* of people met for religious worship by making then and there a noise, and by rude and indecent behavior and profane discourse within their place of worship, and so near to the same as to disturb the order and solemnity of the meeting, against the peace and dignity of the state."

This indictment was quashed on motion of defendant. The State appealed.

Ewing, (attorney general,) for the State.

S. W. Woods, for respondent.

- I. The indictment is bad for the reason that the language of the statute is not followed in describing the offence, in this that the word *congregation* is not an English word. Records

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and proceedings should be in the English language. (R. C. 1855, chap. 47, § 34; State v. Jones, 20 Mo. 61.) It is double and uncertain. (State v. Jane, a slave, 3 Mo. 45.)

SCOTT, Judge, delivered the opinion of the court.

There is no policy in encouraging carelessness or laxity in criminal pleadings. When any departure from the required form is tolerated, it, instead of being regarded as a beacon to warn the pleader of danger, is instantly seized upon as a precedent and urged as a reason why there should be a greater relaxation of the rule requiring the observance of forms. In this way the courts will be led step by step to the subversion of all order in the administration of the criminal code. When a man is called upon to defend himself against the charge of having violated the law, it is not unreasonable that he should require the accusation against him to be in sensible language.

The 33d section of the act to establish courts of record and prescribe their powers and duties enacts that "all writs, process, proceedings and records in any court shall be in the English language, (except that the proper and known names of process and technical words may be expressed in the language heretofore and now commonly used,) and shall be made out on paper or parchment in a fair, legible character, in words at length and not abbreviated; but such abbreviations as are commonly used in the English language may be used, and numbers may be expressed by Arabic figures, or Roman numerals, in the customary way."

The letters composing "congration" do not make an abbreviation commonly used in our language. Nor do they make an abbreviation which is commonly used for the word "congregation." If "congration" is not an abbreviation, then it is no word at all known to our language. It is well settled that offences must be described in the language of the statute by which they are created. It is an absurdity to say that a man disturbed a "congration" of people. It is, we conceive, no answer to the objection that we can conjecture what was intended by the pleader. The accused has a right

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to have the accusation preferred against him in legal language before he is called upon to plead to it, and there is no propriety in indulging circuit attorneys in such gross carelessness, who, so far from profiting by their past errors, would have them all precedents for still greater errors. Judge Ryland concurring, the judgment will be affirmed; Judge Leonard absent.

MARTINDALE, Respondent, v. HUDSON, Appellant.

1. Where the payee of a negotiable promissory note assigns the same, not for value, but fraudulently, with a view to prevent the maker from setting up by way of set-off a demand against the payee, the maker may in a suit against him by such assignee or endorser, plead the fraudulent assignment, and set-off such demand.

Appeal from Barry Circuit Court.

The facts sufficiently appear in the opinion of the court.

F. P. Wright, for appellant.

I. The recovery against defendant as garnishee was a good bar to the action, and record should have been admitted in evidence. (*Wolf v. Cozzens*, 4 Mo. 431.) And so if the note had been settled upon transfer, such settlement was a good bar.

II. The answer charges that the transfers were fraudulently made for the mere purpose of preventing an offset; such transfer, if so made, would not prevent defendant from availing himself of any defence he might have to the note. The evidence tended to prove such fraudulent transfer and was improperly excluded on that account.

III. If any amendment to the answer was necessary, the court erred in refusing leave to amend.

Cravens, for respondent.

I. The circuit court was correct in sustaining the motion of plaintiff to strike out that part of defendant's answer which avers that Thos. Martindale, the original holder of the note,

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was indebted to defendant upon settlement—the note being given for value received, negotiable and payable without defalcation or discount (R. C. p. 322); and also in refusing to let defendant amend a second time where the proposed amendment was a mere repetition of what had been by the court stricken out.

II. The answers of defendant to interrogatories upon garnishment were properly excluded, because the answers of garnishees are not even conclusive against the party at whose instance they are summoned. The judgment upon the answer was all that could possibly be admitted. (R. C. p. 258.)

III. The testimony of witness Logan, in regard to the calculations he had made for Thomas Martindale, the original holder of the note, and defendant, when they attempted to make a settlement, was rightly excluded, because the court had stricken out that part of defendant's answer which alleged Thomas Martindale's indebtedness to him upon settlement.

RYLAND, Judge, delivered the opinion of the court.

This is a suit on a promissory note made by defendants, dated January 7, 1856, payable to Thomas Martindale, ten months after date, for six hundred dollars, for value received. The plaintiff states that said Martindale, on the 19th of April, 1856, assigned by endorsement and delivered said note to one Charles O'Kelly. Plaintiff further states that said O'Kelly, on the 13th of September, 1856, assigned by endorsement and delivered said note to the said Thomas Martindale. Plaintiff also further states that said Thomas Martindale, on the 2d day of February, 1857, assigned by endorsement and delivered said note to the plaintiff; he asks for judgment, &c.

The defendants, Hudson and Culton, appeared and filed their answer, in which, after stating that they knew nothing about the first two assignments from Martindale to O'Kelly and from O'Kelly back again to Martindale, they deny expressly that the note was by said Thomas Martindale assigned

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to the plaintiff for value received ; but state that the said note was assigned to the plaintiff to defraud the defendants and prevent the defendants from pleading an offset to said note, and to defraud them. The defendants then set up in the answer the fact that they had been garnished on execution against said Thomas Martindale in favor of one Passington Packwood, and that judgment had been rendered against them for all that they were owing on said note to said Martindale, and referred to the interrogatories, answers and judgment in the circuit court of Barry county. They also state that they do not owe to the plaintiff the said sum of six hundred dollars, or any part thereof. They state that said Thomas Martindale, the original holder of said note, owes defendants, on settlement made before the assignment of said note to plaintiff on the 2d day of February, 1857, one hundred and forty-nine dollars, for which he asks judgment, with interest from the said settlement.

The plaintiff moved to strike out all that part of the defendants' answer which alleges that Thomas Martindale, the original holder of the note, is indebted to defendants on settlement in the sum of one hundred and forty-nine dollars, because said demand could not be pleaded as a set-off against plaintiff in this cause and to said note. This motion the court sustained, struck out that part of the answer, and the defendants saved the point by bill of exceptions. The defendant offered to prove that a settlement was made between Martindale, the original holder of the note, and himself. The defendant Hudson offered to prove this, the plaintiff having dismissed the suit as to the other defendant, Culton, and it was then carried on against Hudson alone, who offered to prove the settlement and the indebtedness of Thomas Martindale to him ; and that the said note sued on was taken into consideration at the time the calculations were made by the witness Logan between these parties. This evidence was rejected and the defendant saved the point. The defendant also offered to read the answer filed by him to the interrogatories asked by him on the garnishing process in favor of

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Packwood against defendant on the execution against Martindale, the payee of the note. This was likewise refused by the court, and the point saved by defendant. Judgment was rendered against defendant on the verdict of the jury below. He moved to set aside the verdict and for a new trial, which being denied him, he brings the case here by appeal.

From the record it is manifest that this case was badly tried below; it is badly brought up here; the record is carelessly made out; still we can see what was attempted to be done in the lower court. The court below erred in striking out that part of defendant's answer which stated and showed the indebtedness of Martindale to the defendant on settlement. The answer expressly denies that the note was assigned to plaintiff by Martindale for value; it avers that the assignment was made in fraud to prevent the defendants from setting up the said Martindale's indebtedness to them as a set-off against the note. It nowhere appears on the record what kind of a note this was—whether a negotiable note or a non-negotiable one. It is not set out in the record; but take it for granted it was a negotiable note, and still the fact alleged in the answer—that the assignment was not for value, but was a fraudulent assignment, made covinously to hinder the defendant from setting up his demand against the holder and assignor, the original payee, and that he was indebted to the defendant—was a good defence to the action; and it was error to strike out that part of the answer setting up the indebtedness, leaving the statement as to the fraudulent assignment still remaining in the answer. In the case of *Baker v. Brown*, assignee, 10 Mo. 396, this court held that as between the original parties to a bond or note a set-off is allowed, although the bond or note be payable "without defalcation or discount;" and that if such a note be fraudulently assigned, the defendant may plead such fraudulent assignment and set-off a demand against the payee. The decision in this case settles the main questions in the one now before us. The court erred in striking out the part of the defendant's answer in relation to the indebtedness of the assignor and

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payee. It erred in rejecting the testimony of the witness about the settlement and indebtedness to defendant of the original payee of the note.

The record is so meager we can not tell what was done in relation to the judgment against the defendant as garnishee. It seems that defendant only offered to read his answers to the interrogatories. This was refused. It also appears that the judgment on the garnishing process was read. We shall say nothing on this point further than to say, it is the duty of the party excepting to the rulings of the inferior court to have the points properly presented and properly saved, and not put this court to the trouble of trying to find out what was done by guessing at part, and supplying and modifying the rest. We can not see how much or what portions of the record in the garnishment case was offered to be read by defendant. He had better present his full record next time and save the point plainly, so that we can see what was offered and what was rejected. The judgment below is reversed; Judge Scott concurring, and the cause is remanded.

THE STATE, Respondent, v. Ross, Appellant.

1. An indictment charging that the defendant "with force and arms, at &c., upon the body of one E. J., then and there being, feloniously did make an assault, and then and there feloniously and forcibly *did attempt to ravish* and unlawfully and carnally know the said E. J. against her will, who was then and there a woman of the age of ten years and upwards, contrary," &c., is bad under section 87 of article 2 of the act concerning crimes and punishments (R. C. 1845, p. 350,) in that it does not charge an assault *with intent to ravish*; it is also bad under section 1 of article 9 of said act.

Appeal from Andrew Circuit Court.

Loan and Hall, for appellant.

- I. The indictment (if framed on any section of the statute at all) was framed on the 38th section of article 2 of the act concerning crimes and punishments. (R. C. 1855, p. 567.)

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It is not good under this section, because it does not charge the assault was made "with intent to commit a rape." This is the essence of the offence, and it was necessary to allege it in the indictment, and prove it on the trial.

II. The indictment does not show such an attempt, which, had it been completed, would have amounted to rape. It charges that "the said Emily Johnson was a woman of the age of ten years and upwards." It ought to have charged that she was a "female child under the age of twelve years," or a "woman of the age of twelve years or upwards." It charges neither. These are the statute definitions of the persons upon whom a rape may be committed, and they can not be changed by pleading.

Ewing, (attorney general,) for the State.

I. The assault is charged, and the design, purpose or intent of the assault is averred as clearly as language could make it, by alleging an attempt to ravish. The averment that defendant did attempt to ravish, &c., shows not only *quo animo* the assault was made, but also some endeavor or effort towards accomplishing it. These words of the indictment, *ex vi termini*, import the intent with which the assault was made, namely, to commit the offence charged to have been attempted. There could have been no attempt to ravish without an intention to do it. The manner and means of the assault, or the manner of the attempt to ravish, need not have been averred. If a word used in the indictment is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient. (Wharton C. L. 190; State v. Bullock, 13 Ala. 418; United States v. Bachelder, 2 Gall. 15; State v. Hickman, 3 Halst. 299.)

II. The statute definitions of the persons upon whom a rape may be committed are "any female child under the age of ten years," or "any woman of the age of ten years or upwards," and the indictment follows the statute. (R. C. 1845, art. 2, §-26, p. 348.)

State v. Ross.

RYLAND, Judge, delivered the opinion of the court.

The defendant Ross was indicted at the May term of the circuit court of the county of Gentry, in the year 1856, for an assault and attempt to ravish one E. J. The defendant appeared to the indictment, filed his petition for a change of venue, which was allowed, and the venue was changed from Gentry circuit court to the circuit court of Andrew county. At the April term of the Andrew circuit court, 1857, the defendant moved the court to quash the indictment; this motion being overruled, he pleaded not guilty; was tried and convicted; the jury assessed his punishment to a fine of five hundred dollars and three months' imprisonment in the county jail. The defendant filed his motion for a new trial, which was overruled; also filed his motion in arrest of judgment, which being overruled, he excepted, filed his bill of exceptions, and brings the case here by appeal.

The questions before us involve the sufficiency of the indictment, which, in substance, is as follows:

"In the circuit court, May term, 1856—county of Gentry, to-wit. The grand jurors of the state of Missouri, &c., upon their oath present, that George Ross, late of said county, on, &c., with force and arms, at, &c., upon the body of one Emily Johnson, then and there being, feloniously did make an assault, and then and there feloniously and forcibly did attempt to ravish and unlawfully and carnally know the said Emily Johnson, against her will, who was then and there a woman of the age of ten years and upwards, contrary," &c.

The reasons assigned in the motion to arrest are, 1st, because the indictment does not describe any offence known to the law; 2d, the indictment does not allege any intent to the assault therein set forth; 3d, said indictment does not charge that any act was done towards the commission of the offence therein described; 4th, because said indictment does not charge that defendant failed to perpetrate the offence therein described; 5th, said indictment does not follow the words of the statute.

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The indictment in this case is founded either on section 37 of article 2 of act concerning crimes and punishments, or on section 1 of article 9 of same act. (R. C. 1845, p. 350, 408.) The 37th section of article 2 declares that "Every person who shall be convicted of an assault *with intent* to commit any robbery, rape, burglary, manslaughter or other felony, the punishment for which assault is not hereinbefore prescribed, shall be punished," &c. Under this section it is necessary to aver the intent with which the assault was made; it is the *intent* which mainly constitutes the offence. It is a material and necessary part of the description of the offence; and without the intent with which the assault was made being averred and laid in the indictment, it is not good and sufficient under this section. The indictment in this case does not charge that the assault was made with any intent. It charges that the defendant did feloniously make an assault, and that the defendant did feloniously and forcibly attempt to ravish and carnally know, &c.; but it does not charge that the defendant feloniously made the assault *with intent* to ravish and carnally know, &c. It does not charge that the defendant made the assault feloniously, with intent to commit a rape, &c. The indictment leaves out an important ingredient necessary to make the assault constitute the offence in this section of the act. It is a necessary descriptive part of the offence. It becomes therefore material, and can not be dispensed with.

Although it is not in general necessary to an indictment for a statutable offence to follow the exact wording of the statute, and it is sufficient if the offence be set forth with substantial accuracy and certainty to a reasonable intendment, yet words which enter into the description of the offence and constitute the specific offence can not be dispensed with. Where they are descriptive of the offence, they must be used. The law in such cases allows of no substitute, because no other words are exactly descriptive of the offence. (2 Gall. 18.) Now it is necessary, under this 37th section, to aver the *intention* with which the assault was made. Words show-

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ing that intention are unimportant, for no particular words are used in this section ; but the assault must be charged to have been made *with intent* to do the deed or act prohibited ; otherwise the assault is not embraced within this section.

This offence is not included in the 1st section of the 9th article of the act, because that section embraces offences where no provision is made by law for the punishment of such attempts. This offence, if the indictment had properly charged it, could have been punished under section 37 of article 2.

Although this court overrules all mere technical defects, niceties which had grown to be a blemish and inconvenience in the law, in order that the great ends of society may not be defeated in the punishment of those who offend against its regulations, yet we can not disregard substantial defects. It appears strange to us why the circuit attorneys should so often leave out the descriptive words in the offences created by our statutes and resort to others. This defendant was convicted of an act which calls aloud for punishment, and it is with much reluctance that we feel compelled to send this case back. But we must look to the law and decide according to its mandates. Judge Scott concurring, the judgment will be reversed, and cause remanded.

NELSON, Plaintiff in Error, v. JOHNSON, Defendant in Error.

1. In an action for the price of slaves sold, the defendant may recoup the damages sustained by him by reason of a breach of warranty of the slaves.

Error to Cooper Circuit Court.

This was an action upon a promissory note for \$300. The defendant set up in his answer that the consideration of the note had failed ; that the note was given for part of the purchase money of two slaves sold by plaintiff to defendant ; that the plaintiff had warranted the said slaves to be sound and healthy ; that they were not sound and healthy as warranted.

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The court, at the instance of the defendant, gave the following instruction to the jury: "If the jury believe from the evidence that the note sued upon was for a balance of the purchase money of the slaves mentioned in the defendant's answer, and that said slaves were warranted by plaintiff to be sound, and either of them was unsound at the time of the sale, then they must take the same into consideration, and abate the note accordingly, and if the slave was lessened in value to the amount of the note, they must find for the defendant."

Gardenhire and Morrow, for plaintiff in error.

Adams, for defendant in error.

I. A breach of warranty of soundness given on the sale of slaves is a good defence against a note for the purchase money, and may be set up, as it was in this case, by way of recoupment. It was the only defence relied upon in the answer, and was properly presented by the evidence and the instruction given on the part of the defendant.

II. The suggestion of surprise in the plaintiff's motion and affidavit for a new trial was the merest pretence. The affidavit upon its face showed that he must have known what the defence was, although he may never have in fact read or heard the answer read. It sets up as an excuse his own negligence. The case had been in court for more than eighteen months, and the answer had been filed in the cause for eighteen months, and the cause had been continued by the plaintiff himself from term to term on account of the absence of witnesses, and yet witnesses were not wanted for any other purpose than to rebut the proof of a warranty and its breach. Upon the trial the only evidence offered or given on either side was in relation to this issue alone, for there was no other issue in the cause. The plaintiff gave evidence to show that there was no warranty, and the receipt referred to in his affidavit (if there had been any such) was only cumulative, and would be no ground for setting the verdict aside even if he had been surprised. (*Beaucham v. Sconce*, 12 Mo. 57.) The

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affidavit ought to have alleged due diligence, but instead shows the grossest negligence. Even if the party had been mistaken as to the nature of the defence, it would be no ground for a new trial. It was his duty to inform himself. The answer was open to his inspection, and if he failed to look at it, it was his own folly. The affidavit does not aver that the verdict is unjust, and, to warrant the court in interfering, such an averment is essential. (See Hanly v. Blanton, 1 Mo. 36; Mushen v. Judy, 4 Mo. 831; Elliot v. Leak, 4 Mo. 540; Stout v. Colver, 6 Mo. 251; Lisle v. State, 6 Mo. 426; Stegers v. Darby, 8 Mo. 679; Robbins v. Alton Marine & Fire Ins. Co. 12 Mo. 387; State v. Laramore 20 Mo. 427; Wells v. Sanger, 21 Mo. 354.)

RYLAND, Judge, delivered the opinion of the court.

Since the decision made by this court in the case of Wade v. Scott, 7 Mo. 509, which was rendered in August, 1842, it has been considered as the settled law in this state that in a suit for the consideration money arising on the sale of a slave, the defendant, in case there was fraud or a breach of warranty, may give evidence showing the amount of damages sustained by him by reason of the fraud or breach of warranty in diminution of the stipulated price. "It is more reasonable," said the judge who delivered the opinion of the court, "that when a suit is brought to recover the price of an article, that any reduction of the stipulated price, to which the defendant may be entitled either from a fraud or breach of warranty in the sale, should be made in the action in which the price is sought to be recovered, than that he should be driven to his cross action for a redress of the injury." In House v. Marshall, 18 Mo. 368, the same doctrine is held. In this case the notes sued on were given for the purchase money of land bought by defendant of the plaintiff. We held that the defendant might recoup the damages sustained by him by reason of the false and fraudulent representations of the plaintiff as to the quality and advantages of the land. (See also Grand Lodge of Masons v. Knox, 20 Mo. 433.)

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In this case the recoupment of damages on account of the breach of the warranty made on the sale of the slaves, for the purchase of whom the note sued on was given, was the only defence set up and relied upon in the defendant's answer. The instruction then given by the court on behalf of the defendant was unobjectionable. The evidence offered by defendant conducing to show there was a warranty, and that offered by plaintiff conducing to show there was none, the matter was properly left to the finding of the jury. The instructions given by the court for the plaintiff are not complained of, and the record shows that all were given which he asked.

As to the suggestion of surprise which is made by the plaintiff in his affidavit in support of the motion for a new trial, in our opinion, there is no weight in it. At most, it set up as an excuse his own negligence. The record shows that there had been two or three continuances—the case had been pending for some eighteen months. He might have known the defence relied on. He was party to the whole transaction. He knew what had been before the persons who had been once requested to arbitrate the difficulty. He had made his own statement and knew what the defendant relied on before them. We can not regard this suggestion of surprise as entitled to any consideration.

Upon the whole record, there is no error authorizing a reversal. Judge Scott concurring, the judgment is affirmed.

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BOATMAN *et al.*, Respondents, v. CURRY, Appellants.

1. The fact that an instrument, the foundation of an action, is not filed with a justice of the peace, is no ground for dismissing the suit; at most such failure is a ground for a continuance.
2. A wife may when she becomes discovert affirm and ratify a deed made by her during coverture.
3. Though, in a suit in behalf of persons claiming to be husband and wife to recover rent of the wife's land alleged to be due, it is competent for them to prove the marriage by evidence of cohabitation and by general reputation, yet the defendant may show that the alleged marriage is illegal and void.

Boatman v. Curry.

Appeal from Kansas City Court of Common Pleas.

This was a suit instituted by John Boatman and Elizabeth, his wife, before a justice of the peace, to recover \$40, the rent of a farm for six months. The cause was taken by appeal by the defendant Curry to the Kansas city court of common pleas. The account filed before the justice was as follows: "Oliver P. Curry to John Boatman and Elizabeth Boatman, Dr. To one-half year's rent of farm, at \$80 per year—\$40." Before the trial the defendant moved to dismiss the cause because it was founded on a certain lease which had not been filed with the justice before process was issued. This motion was accompanied by proof that the same motion had been made before the justice and had been overruled. The court overruled the motion. The plaintiffs "proved by several witnesses," says the bill of exceptions, "that plaintiff Elizabeth Boatman, sometime about the 12th day of April, A. D. 1856, and whilst the wife of one George Daniels, leased in writing to one Sylvanus Crow certain premises formerly occupied by the said George Daniels and the said Elizabeth during the time they lived together, and which continued to be used and occupied occasionally by said George Daniels after the commencement of a suit by him against the said Elizabeth for a divorce. Plaintiff further proved that said lease was produced by plaintiffs on the trial before said justice, but that since said trial it had been lost or mislaid. Plaintiffs were then permitted to prove the contents of said lease without being required to prove the execution thereof, to which defendant objected; to which action of the court, in overruling said objection and admitting said evidence, defendant, by his attorney, excepted. Plaintiffs then proved by a witness, T——n, that defendant on one occasion, some time in April, A. D. 1856, and after he had taken possession of said premises, said he owed Mrs. Daniels some rent, but did not state the amount. Plaintiff proved by another witness, Casside, that defendant told him that the defendant held the premises and that he stood in Crow's shoes

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under Crow's bond, and that he had paid Crow forty dollars. Plaintiffs proved by one Matthews the contents of said lease, and that the amount of rent thereon stipulated to be paid by Crow to Mrs. Daniels was the sum of eighty dollars per annum, and that the place was worth one hundred and twenty dollars per annum. There was no evidence of any contract between plaintiffs or either of them and defendant respecting the use and occupation of said premises. Before any evidence was offered by plaintiffs, defendant made to said court and jury a special denial of the marriage of plaintiffs and of their right to maintain this action as husband and wife. The court permitted plaintiffs to prove a general reputation of their marriage, and that they lived together as husband and wife, to which evidence defendants objected, and to which action of the court overruling the objection and admitting said evidence defendant excepted. Plaintiffs made no further proof of their marriage. It appeared in evidence that the said Elizabeth, who sues herein by the name of Elizabeth Boatman, is the same Elizabeth Daniels who leased said premises to said Crow, and from whom the said George Daniels subsequently procured a divorce. Defendant then offered in evidence a certified copy of the record of a judgment of said court rendered on the 19th day of July, A. D. 1856, in a certain cause between the said George Daniels as plaintiff and the said Elizabeth Boatman, one of the present plaintiffs, then Elizabeth Daniels, as defendant, divorcing the said George Daniels from the said Elizabeth Daniels. To the introduction whereof plaintiffs objected for irrelevancy. Defendant then stated to the court its supposed relevancy and purpose thereby to prove, 1st, the coverture of plaintiff Elizabeth Boatman at the time of the leasing by her to said Crow; and, 2d, her incapacity to marry again for the space of five years from the said 19th day of July, A. D. 1856, the date of said judgment of divorce. The court sustained plaintiff's objection to the introduction of said judgment for irrelevancy and excluded the same from the jury; to which opin-

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ion and action of the court, in sustaining said objection and excluding said evidence, defendant excepted."

The court, at the instance of the plaintiff, gave the following instructions: "1. If the jury believe from the evidence that defendant occupied the farm or tract of land rented by Sylvanus Crow from plaintiff Elizabeth Boatman during the year ending April, 1857, they will find for the plaintiffs whatever amount they may believe from the evidence remains unpaid of the rent which said Crow was bound to pay by virtue of his contract with said Elizabeth. 2. If the jury believe from the evidence that defendant agreed to take the farm off the hands of said Crow, and by reason and in pursuance of said agreement took possession of and occupied said farm, they will find for plaintiffs the amount which they may believe due on the 1st of January, 1857, on account of the use and occupancy of said farm under the contract of April, 1856. 3. That George Daniels, the former husband of said Elizabeth Boatman, has no right to and can not by reason of his marriage with her legally claim any of the money or property of his said wife which he had not reduced into actual possession prior to the term of his divorce from her."

The court, at the instance of the defendant, gave the following instruction: "4. Unless the jury believe from the evidence that said John and the said Elizabeth were legally married prior to the commencement of this suit, they must find for defendant."

Napton, for appellant.

I. The court erred in admitting proof of the contents of a lease without preliminary proof of its execution. By the instructions and testimony it will be seen that the responsibility of defendant was based upon a lease to a third person, and this lease was of course inadmissible without proof of its execution.

II. The lease was invalid if executed by a married woman, and the plaintiffs' own proof showed this to be the case.

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III. Although proof of general reputation might in ordinary cases of this character be sufficient to establish a marriage, yet as the marriage was expressly put in issue and the defendant offered record evidence of the incapacity of Mrs. Daniels to contract a second marriage at the time of the alleged marriage, the court erred in excluding such proof and determining general reputation to be conclusive.

IV. But, apart from these questions, the first instruction given by the court was wrong, and the instruction is independent and not ratified or in any way affected by any other instruction given on either side. It assumes the liability of defendant on account of a tenancy supposed to exist between plaintiffs or one of them and a third person, with whom no connection of defendant is required to be shown—no agreement to assume his liabilities—no acknowledgment of tenancy—and without reference to any payment made to such third person.

V. The second instruction is also wrong. In short, whatever may be the merits of this case, in an ordinary action for use and occupation, which the evidence does not disclose, it is manifest that there was an entire failure of proof to put the defendant on the same footing of responsibility with the lessee Crow, and the instructions of the court did not place the points of law clearly before the jury.

SCOTT, Judge, delivered the opinion of the court.

There is nothing in the point that the lease was not filed with the justice before suit was brought. The defendant was no party to the lease, and of course it could not be the foundation of an action against him. There is nothing in the record in relation to an assignment of it. Besides, it is no ground for dismissal that the instrument—the foundation of the action—is not filed with the justice; at most, such failure can only cause a continuance, if one is necessary to a fair trial.

The deed of a married woman may be void; but if it is void

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why insist on its execution being proved? No doubt, when the loss of an instrument is established, its execution must be proved before it can be read. (1 Starkie, 349.) How that is to be done will depend on the circumstances of the case, taking care not to allow an inferior degree of evidence when it appears that evidence of a higher degree is attainable. But though the deed of a married woman may be void, yet when she becomes discovert, there is nothing that prevents her from acquiescing in the contract stated in the deed; and if she does so and both parties agree to it, they will be bound by it, and it is not for third persons to object to the validity of such an agreement.

It was allowable for the defendant to show that the marriage established by evidence of reputation and cohabitation was illegal and void. The proof of marriage by cohabitation was sufficient in this form of action, and the defendant could not change the nature of the evidence necessary to prove a marriage by any averment he might make that there was no marriage between the parties, or by an attempt to raise an issue on the specific denial that there was an actual marriage. But though a marriage may be proved by evidence of cohabitation, yet it is competent for a party to show that it was illegal and void. (2 Starkie, 221, 939.)

The judgment must be reversed for the giving of the first instruction asked by the plaintiffs. It is wholly unfounded in law. The statement of the proposition therein contained is sufficient for its refutation. Nor is it helped by the rule that all the instructions given in a cause must be considered together. The proposition contained in the instruction is an independent one, and of itself warranted a verdict. Besides, if the rent of the farm was eighty dollars a year, although the defendant may have enjoyed it for six months, yet it may be his enjoyment was not as beneficial as that of him who enjoyed it for the six preceding months. The occupancy of the defendant may have been for a time when no crop could have been made. In the absence of all agreement as to the amount of rent to be paid, the plaintiffs could only recover

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the value of the enjoyment to the defendant. Judge Ryland concurring, the judgment will be reversed and the cause remanded ; Judge Leonard absent.

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THE STATE, Plaintiff in Error, v. WETHERFORD, Defendant in Error.

1. Where two are jointly indicted, and one only applies for a change of venue, an order removing the cause will be effectual only as to the one so applying ; if a recognizance be in such case entered into by both to appear in the court to which the cause is removed, it will be void as to the one not applying for a change of venue.

Error to Benton Circuit Court.

Henderson Wetherford and Clemsey Wetherford were jointly indicted in the Morgan circuit court at the March term, 1852, for a felonious assault upon one Cline, with intent to kill. After several continuances, at the April term, 1854, Clemsey Wetherford failing to appear, a forfeiture of her recognizance was taken. At the October term, 1854, Henderson Wetherford filed the following petition for a change of venue :

“ To the Honorable the Circuit Court within and for Morgan county, and state of Missouri : Your petitioner, Henderson Wetherford, would respectfully state that he believes the defendants can not have a fair trial of this cause in this judicial circuit on account of the prejudice of the circuit judge, and that he only became satisfied of said prejudice since the calling of this case. Defendants therefore respectfully ask that said cause may be sent by change of venue to some judicial circuit where such prejudice does not exist. Henderson Wetherford makes oath and says he believes the matters stated in the foregoing petition are true. [Signed] Henderson Wetherford.”

The court thereupon granted the prayer of the petition and made an order removing the cause to the Benton circuit

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court. Henderson Wetherford and Clemsey Wetherford both entered into a recognizance to appear in the Benton circuit court. Clemsey Wetherford failing to appear to answer to the indictment in the Benton circuit court, her recognizance was forfeited and a *scire facias* awarded. On the return day of the *scire facias*, Clemsey Wetherford appeared and filed a motion to set aside the forfeiture of the recognizance and dismiss the cause and all proceedings had in relation to Clemsey Wetherford, because the indictment was found in the county of Morgan and there never was any change of venue taken to the Benton circuit court, because the Benton circuit court had no right to take such forfeiture; that said Clemsey was not bound to appear in the Benton circuit court by force or virtue of said recognizance; and that the court had no jurisdiction of the same. The motion was sustained and the proceedings dismissed, and the defendant, with her securities, discharged.

The State brings the cause here by writ of error.

Ewing, (attorney general,) for the State.

I. Although the petition for the change of venue was not signed or sworn to by defendant in error, yet it was made on behalf of herself and her co-defendant jointly, and the ground of application is by the terms of the petition made applicable to both. The petition alleges that "defendants can not have a fair trial," and they, "defendants," ask the change of venue. The order of the court is, "that the prayer of the petition be granted." The order is in accordance with the petition and applies to both defendants. Both defendants entered into a recognizance in open court, which is entered of record, to appear in the Benton circuit court to answer the indictment against them. Although certain forms were not complied with by defendant, yet, having consented to the change of venue, waived her right to a trial by a jury of the vicinage, claimed the benefit of a trial elsewhere before a court having jurisdiction of the offence, and referred her cause to its decision, she can not afterwards allege that such

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court has no jurisdiction. The constitutional right of trial by a jury of the vicinage is intended for the benefit and protection of the accused; yet when this is waived, as it was by defendant, and a change of venue was procured, by her own act and consent, to a court of competent jurisdiction on easier terms than if she had complied with all the forms of the law, shall the omission to sign and swear to the petition avail her? (*Porter v. State*, 5 Mo. 538; *The People v. Scam.* 351.) Shall defendant, after thus consenting to a change of venue and obtaining it, without observing certain forms required by law, be allowed to make it the means of escaping from the custody of the law, and evading her recognizance to appear and answer to the indictment? It does not lie in the mouth of a party who has obtained change of venue to object to a trial in the court to which he has caused it to be removed, if enough appears to give that court jurisdiction. (*McBain v. Enloe*, 13 Ill. 76.)

Wright and Johnson, for defendants in error.

I. There was no removal of the cause as to Clemsey Wetherford. The constitution secures to the accused the right, in prosecutions on presentment or indictment, to a speedy trial by an impartial jury of the vicinage. In a case like the present, when a cause is the prejudice of the judge, a change can only be made upon the application of the person in whose favor it is awarded, unless the accused is a slave or a minor. (R. C. 1845, sec. 19, p. 864.) Clemsey Wetherford did not apply for the change, and the fact that she subsequently entered into the recognizance does not alter the case. (*Fanny v. The State*, 6 Mo. 141; *Hunter et al. v. The People*, 1 Scam. 454.) One person, though jointly indicted with another, can not deprive the other of his constitutional right of being tried in the court where the charge is laid.

II. But it is manifest from the record the court only intended to remove the case as to Henderson Wetherford. A forfeiture of Clemsey Wetherford's recognizance had been taken at a previous term. The entry shows that Henderson

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Wetherford alone applied for the removal of the cause ; that he alone appeared and filed the petition, which was signed and verified by himself only, and in the order making the change the cause is headed against him alone. The statute requires the cause of removal to be specified in the order, and the cause here specified is the prejudice of the judge against Henderson Wetherford and not against the defendant in error. The indictment, as against Clemsey Wetherford, still remains in the Morgan circuit court. The recognizance to appear in the Benton circuit court was of no effect, and a forfeiture could not be taken upon it. (Barker v. The People, 11 Gilm. 578.)

RYLAND, Judge, delivered the opinion of the court.

The venue in this case, so far as regards the defendant Clemsey Wetherford, was improperly changed from Morgan circuit court to the Benton county circuit court. Clemsey Wetherford did not petition for the change—took no steps to have it ordered, and the circuit court of Benton county had no jurisdiction over the case, so far as it relates to her.

The judgment of that court then discharging the defendant Clemsey from the indictment was improper, and it must be reversed. The judge of the Benton circuit court should have remanded the case so far as the defendant Clemsey was concerned, to the Morgan circuit court ; have sent it back, and sent her back too, to be tried in the Morgan circuit court ; should not have discharged her. The judgment is reversed, and the Morgan circuit court is directed to proceed and try the defendant Clemsey on the indictment, which is considered as still pending in that court ; Judge Scott concurring.

CALHOUN V. BUFFINGTON, AUDITOR OF PUBLIC ACCOUNTS.

1. The state is liable to pay costs in a criminal prosecution against a slave only in case the slave is convicted of a capital offence and is executed; an escape of the slave from custody or his execution by a mob, either before or after conviction, would not be sufficient to render the state liable for costs.

Petition for a mandamus. This was an application in behalf of Calhoun as clerk of the circuit court of Clay county, for a mandamus to the auditor of public accounts, requiring him to audit and allow two bills of costs—one in the case of The State v. Edmund, a slave—the other in the case of The State v. Peter, a slave. In the first case the defendant was indicted for murder in the first degree, committed to jail, and before trial he escaped therefrom, and has not been retaken. Afterwards at the October term of the circuit court, 1854, on motion of the circuit attorney, the cause was continued generally and to pass off the docket. In the last mentioned case, defendant was indicted for murder in the first degree and committed to jail to await his trial at the April term of the court. Previous to that term defendant was taken from the custody of the sheriff of Clay county and hung. These bills of costs were certified to the auditor, who refused to allow them because, in his opinion, the state was not liable to pay them. The fees in both cases accrued under the act of 1845. The counsel for the petitioner and the attorney general agreed to the foregoing statement of facts; it was also agreed that the decision of the Supreme Court might be made upon the application with the same effect as upon the return to an alternative mandamus.

Wilson, for petitioner.

Ewing, (attorney general,) for auditor.

- I. The State is not liable for the costs. (R. C. 1845, secs. 13, 14, 15 and 16, art. 2, tit. Costs in Crim. Cases, p. 250.) Under this law the State is not chargeable with costs except in cases of conviction, and then only where the slave is convicted of a capital offence and executed.

Calhoun v. Buffington.

RYLAND, Judge, delivered the opinion of the court.

From the facts set forth in the agreed case, upon which the mandamus against the auditor is prayed for, this court must refuse the writ. The State is only liable to pay the costs in a prosecution against a slave when the slave has been convicted and executed capitally. Conviction alone and escape before execution will not put the costs on the State. The 16th section of 2d article of the act concerning costs is as follows: "If a slave be convicted of any capital offence and executed the costs shall be paid by the State." The 13th section of the same article is as follows: "If a slave shall be convicted of any offence in a case where, if the convict was a free person he would be liable to pay costs, such slave shall be sold to satisfy such costs, unless the master or owner appear and pay the same within sixty days after they become due." The 14th section directs the sheriff how to proceed to sell the slave, &c. The 15th section is as follows: "Any slave convicted of a capital offence, who shall be reprieved or pardoned by the executive, shall be sold to satisfy the costs, unless the owner or master appear and pay the same within the time prescribed in the second preceding section"—13th section.

Now the law is plain, and we can see the obvious design of the legislature was not to subject the State to pay costs, when a slave was prosecuted for any offence and convicted of it, until he was executed; for, as long as he could be sold, or as long as life was not taken as the punishment, the slave was to be liable to pay the costs. He was to be sold to raise the funds to pay the costs. He was to be executed. The lawless violence of a mob, in its impatience to inflict punishment, taking the life of a slave, is not the execution contemplated by this statute, even if the slave had been convicted before he was hung by the mob. The escape from prison does not render the State liable even after conviction. He must be executed under the process of the court as a punishment of the offence before the State becomes liable to pay the costs. Judge Scott concurring, the writ is refused.

City of Fayette v. Shafroth.

CITY OF FAYETTE, Plaintiff in Error, v. SHAFROTH, Defendant in Error.

1. The act incorporating the city of Fayette confers upon the mayor thereof the same jurisdiction, in cases arising in said city, that justices of the peace have in their respective townships; (Sess. Acts, 1855, Adj. Sess. p. 212, sec. 11;) he can not entertain jurisdiction of an action for a penalty exceeding ninety dollars imposed by an ordinance of said city.

Error to Howard Circuit Court.

This was a prosecution instituted in the name of the "City of Fayette," before the mayor of said city, against John Shafroth, for violations of an ordinance of said city "to regulate the liquor traffic." The complaint, or rather one of the complaints, is in the following form :

"December 26, 1856. John Shafroth to the City of Fayette, Dr. To one hundred dollars for violation of the first section of an ordinance of said city, entitled 'An ordinance to regulate the liquor traffic,' in this, to-wit: that he sold to Mr. A. B. one gallon of brandy, on or about the 20th day of December, 1856, within the corporate limits of said city. [Signed] W. W. M., City Constable."

There were two other complaints alleging violations of the same ordinance, one hundred dollars being claimed in each. Judgment was rendered against the defendant for \$100 and costs, in all \$110. An appeal was taken to the circuit court. In the circuit court the defendant moved the court to dismiss the proceedings because the mayor had no jurisdiction thereof, and because the amount claimed exceeded his jurisdiction. The court overruled the motion.

Certain ordinances of the city of Fayette were offered in evidence on the part of plaintiff. The defendant objected to their introduction, on the ground that the suit was brought in the name of the City of Fayette and not in the name of "The Mayor, Councilmen and Citizens of the city of Fayette," as required by the charter. The objection was sustained. The plaintiff offered to amend by inserting the

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"Mayor, Councilmen and Citizens of the City of Fayette," in lieu of "The City of Fayette," wherever the latter name occurred. The court refused to allow the amendment. Plaintiff took a nonsuit with leave to move to set the same aside.

Williams, Gardenhire and Morrow, for plaintiff in error.

Prewitt, for defendant in error.

I. The suit is in the wrong name (see Sess. Acts, 1855, p. 210; Section 1 of Charter; 4 Iredell Eq. 195), and can not be amended in the circuit court; (*Kraft's Adm'r v. Hurtz & Jungk*, 11 Mo. 111; *Flemm v. Whitmore*, 23 Mo. 430.)

II. The mayor has the same jurisdiction as a justice of the peace. (Charter; Sess. Acts, 1855, Adj. Sess. p. 212, § 11.) This exceeds a justice's jurisdiction. (2 R. C. 1855, p. 925.) Plaintiff can not remit the excess in the circuit court. (2 Mo. 13; *Robnell v. Nuren*, 9 Mo. 246; *Batchelor v. Bess*, 22 Mo. 402); nor can consent before the justice confer jurisdiction. (*Stone v. Corbett*, 20 Mo. 350.)

III. The courts of the country are the proper forums to recover penalties for the breach of any ordinance of a corporation (*Angel & Ames on Corp.* 304); and a jurisdiction having been conferred on the mayor and limited by express provision of the charter, the power can not be implied in the city to confer a greater jurisdiction. If the legislature had intended to authorize the city to erect any court to try offenders against her ordinances, it would not have been left to implication. Corporate powers are strictly construed. (2 Kent, Com. 299; 9 Mo. 502.) More especially ought not the power to be implied to confer unlimited jurisdiction on the mayor, who is a party to the suit when properly brought. (*Broom's Legal Maxims*, 109; 1 Thomas' Coke, side page, 15; *Wilcock on Corp.* 86, 91.)

IV. The mayor can have no jurisdiction, because he is the executive (Charter, § 10,) and part of the law-making power, (§ 6, 13, 18 and 19,) and the offices are incompatible. (Constitution of Missouri, article 2; *State v. Stutt*, 2 Ark. 282;

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State Bank v. Curran, 5 Eng. 142; 3 Greenl. 484; Bamford v. Melvin, 7 Greenl. 17; 2 Dallas, 409; 13 How. 44; State v. Fry, 4 Mo. 120; 12 Mo. 498.)

SCOTT, Judge, delivered the opinion of the court.

The 11th section of the act to incorporate the city of Fayette, approved December 7th, 1855, provides that the mayor shall be, *ex officio*, a justice of the peace within and for the city, and shall have the same jurisdiction, in all cases in the city, as justices of the peace have in their respective townships. Among other things, the first and second sections of the first article of the act establishing justices' courts and regulating proceedings therein declares that "every justice of the peace is authorized to hold a court for the trial of all actions for any penalty not exceeding ninety dollars, given by any statute of this state." These sections clearly show that, except in actions on bonds and notes, the legislature intended that justices of the peace should not entertain jurisdiction in any other cases, where the amount in controversy, exclusive of interest, exceeded ninety dollars. The penalty here sought to be recovered is for the sum of one hundred dollars. Under the charter the corporate authorities had no authority to enlarge the jurisdiction of the mayor beyond the sum fixed by that instrument.

The charter is to the corporate authorities what the state constitution is to the general assembly. As a law against the constitution is void, so an ordinance of a corporation against the provisions of its charter is of no validity. Judge Ryland concurring, judgment affirmed; Judge Leonard absent.*

* LEONARD, Judge, by reason of indisposition, was necessarily absent during this term.

[END OF JULY TERM.]

CASES
ARGUED AND DETERMINED

IX

THE SUPREME COURT
OF
THE STATE OF MISSOURI,

OCTOBER TERM, 1857, AT ST. LOUIS.

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CITY OF CARONDELET, Appellant, v. CITY OF ST. LOUIS, Respondent.

1. The act of Congress of June 18, 1812, *proprio vigore*, vested in the inhabitants of the various towns and villages designated in the first section of said act the absolute legal title to the common possessed and used as such by them respectively prior to December 20, 1808.
2. To enable the inhabitants of a town or village designated in said act to assert title to, and recover possession of, land as common confirmed by said act of June 18, 1812, no United States survey is required; proof of possession and user as common prior to December 20, 1808, is sufficient.
3. The approved U. S. survey of the common of St. Louis is not conclusive as against the inhabitants of the adjacent town (now city) of Carondelet. It may be shown in their behalf that land embraced within said survey was used and possessed prior to December 20, 1808, as common of Carondelet; and that too although it is not embraced within the U. S. survey of the common of Carondelet.
4. An approved United States survey of the common confirmed to the inhabitants of a town or village by the act of June 18, 1812, is *prima facie* evidence of the true location and extent of such common.
5. Such survey would not, however, be conclusive and binding upon the inhabitants of such village unless accepted; it might be shown that it had never been accepted, and that it was incorrect.

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6. No formal act is necessary to constitute an acceptance; it may be inferred from various acts and circumstances; and it is the province of the court to declare to the jury, as a matter of law, the legal effect of such acts and circumstances.

Appeal from St. Louis Land Court.

The city of Carondelet seeks in this action to recover possession of certain lots of ground in the possession of the city of St. Louis. Carondelet asserts title to said lots under the act of Congress of June 13, 1812, as a portion of the common confirmed to her by said act. The city of St. Louis also asserts title thereto as common confirmed to her by said act of Congress.

At the trial the testimony of sundry aged persons (Antoine Smith, Pierre Chouteau, jr., Amable Chartrand and Paul Robert), familiar with the location and boundaries of the commons of Carondelet and St. Louis, as possessed and used by said villages respectively prior to December 20, 1803, and since, was introduced and relied upon by plaintiff. From this testimony it appeared that during the Spanish domination, and at the time of the change of government, the recognized boundary line, separating the common of St. Louis from the common of Carondelet, commenced at a point on the bank of the Mississippi river known as the "Sugar-loaf," and from thence ran to the north-east corner of the common field of Carondelet; that previous to the change of government there had been a fence running from the "Sugar-loaf" to the said corner of the said common field; that the inhabitants of St. Louis used as common the land lying north of said boundary line and fence, while the inhabitants of Carondelet possessed and used as common the land lying south of said line, including the land in controversy. The plaintiff also introduced in evidence an order of the St. Louis court of common pleas, dated November 9, 1819, incorporating the town of St. Louis upon petition of the inhabitants, and designating a line running due west from the "Sugar-loaf as the southern limit of the corporation, and ordering the metes and bounds

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to be surveyed and a plat thereof recorded; also a survey of the limits of the town as thus incorporated, made in the year 1820 by Joseph C. Brown, in execution of said order, which bounded said town by a line running due west from the "Sugar-loaf."

The defendant then introduced in evidence the approved U. S. survey No. 3125, made in the year 1832, of the St. Louis common. This survey includes the land in controversy in the present suit—the south line of the common of St. Louis being located south of the "Sugar-loaf" and south of the land in controversy. Defendant also introduced in evidence the survey (No. 3102) of the common of Carondelet, made in the year 1834 by Joseph C. Brown, deputy surveyor of the United States. This survey did not include the land in controversy.

The plaintiff then offered in evidence the instructions for a survey of the common of St. Louis, dated November 18, 1832, given by Elias T. Langham, surveyor general of Illinois and Missouri, to Joseph C. Brown, deputy surveyor; also a survey of St. Louis common, made by James Mackey in the year 1806, and purporting to have been made at the request of the inhabitants of St. Louis, and offered to prove that it did not include the land in controversy; also offered to prove that the inhabitants of Carondelet always claimed the land north of the town or village of Carondelet to the "Sugar-loaf" and the north-east corner of the common field of Carondelet as common of Carondelet down to the year 1852; that up to the year 1836 the said land lay open and was used for pasturage and wood by the inhabitants of Carondelet; that when Brown surveyed the common of Carondelet in 1834 the inhabitants of Carondelet claimed their common's line on the north from the "Sugar-loaf" to the north-east corner of the common field of Carondelet; that said Brown ran said line [from the Sugar-loaf to the north-east corner of the common field] as the north line of the common of Carondelet in the presence and under the claim of a great number of the inhabitants of Carondelet; that said Brown

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returned the said north line with the survey of the common field, and fraudulently omitted to return it with the survey of the common of Carondelet, and fraudulently returned another line three quarters of a mile south of said true line so claimed and run as aforesaid; that the inhabitants of Carondelet were people who spoke the French language and not the English; that they were a primitive, innocent people, not acquainted with the language, or laws or customs of the United States; that they believed that their line had been run on the north by the surveyor of the United States, and that they were the parties in the rightful possession; that they protested against the encroachments of St. Louis at various times from 1836 to 1853, and claimed the said land before the common council of St. Louis many different times and before the Land Department of the United States as the land of Carondelet before the bringing of this suit; that no copy or plat or report of Brown's survey of the common of Carondelet was sent to or returned to the commissioner of the General Land Office at Washington until the 22d day of June, 1839. Plaintiff also offered in evidence various documents, consisting of the official correspondence of the surveyor general of Illinois and Missouri, the solicitor of the General Land Office, the commissioner of the General Land Office, and the Secretary of the Interior, tending to show that Brown's survey had been disapproved by the commissioner of the General Land Office and the Secretary of the Department of the Interior. The plaintiff also offered to prove that the inhabitants of Carondelet protested before the commissioner of the General Land Office and the Secretary of the Interior against the survey of their common by Brown in 1834; that they proved before said Brown, when he made said survey, that the true north line of their common ran from the "Sugar-loaf" to the north-east corner of the common field of Carondelet. Plaintiff also offered to prove by experienced surveyors and others that the surveys of the commons of St. Louis and Carondelet do not conform to the confirmations or either of them, and that the instructions under which the surveys were made

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were violated and disregarded ; that said surveys were made in violation of law and of the act of Congress of June 13, 1812.

The court, on motion of defendant, excluded the evidence. The defendant then introduced in evidence, against the objection of plaintiff, the United States survey of the outboundary line of the village of Carondelet. The land in controversy was not embraced within this outboundary line.

The plaintiff then offered to prove that said plat was constructed in the office of the surveyor general in the year 1853, without any actual survey on the ground, from erroneous plats of other surveys ; that no inhabitant of Carondelet was called upon to prove the true or actual outboundary of said town ; that no official or other notice was given to said inhabitants to attend and do so ; that the north line pointed out and proved to Brown by the said inhabitants and run by said Brown in 1834, was fraudulently suppressed by him from the return of the survey of the common, but appeared on the plat of the survey of the common field of Carondelet ; that the said outboundary, as constructed, followed the fraudulent survey of 1834, and that the clerk constructed said map of the outboundary line and did not make any of the surveys on the ground from which it was constructed, nor go on the ground to do so or to verify the same ; that there are not and never have been any such notes of survey in the surveyor general's office as are referred to in the caption of the map of said outboundary line. The court excluded the evidence.

The following instructions asked in behalf of plaintiff were refused by the court : " 1. All the right, title and interest of the United States in and to the commons of the village of Carondelet was vested in the inhabitants of said village on the 13th day of June, 1812, according to the extent and boundaries of the said commons, as the same existed and had been claimed and used by the said inhabitants as common prior to and until the 20th day of December, 1803. 2. If the jury find from the evidence that the land in controversy is within the commons of the village of Carondelet, as the same

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was claimed, used and possessed by the inhabitants of said village prior to and until the 20th day of December, 1803, the title of the United States thereto was vested in the said inhabitants on the 13th day of June, 1812. 3. The surveys No. 3102 for Carondelet commons and No. 3125 for St. Louis commons are each of them *prima facie* evidence of the extent and boundaries of the respective commons of the said villages of St. Louis and Carondelet, and the burthen is on the plaintiff of proving that said surveys are incorrect, and that the true boundaries of the Carondelet commons, if correctly surveyed, would include the land in controversy, and that the true boundaries of the St. Louis common, if correctly surveyed, would not include the land in controversy. 4. The plat of the outboundary lines of the village of Carondelet, purporting to include the out-lots, common field lots, village lots and commons, given in evidence, is *prima facie* evidence that the commons of Carondelet, as confirmed by the act of 13th June, 1812, were within said outboundary lines; and if the land in controversy is not included within said lines, the plaintiff can not recover, unless the plaintiff has proved to the satisfaction of the jury that said outboundary lines are incorrect, and that the true or correct outboundary line, so run as to include the village lots, out-lots, common field lots and commons, would include the land in controversy. 5. If the jury find, from all the evidence in the cause, that the land sued for is within the commons of Carondelet, as the same was used, claimed and possessed by the inhabitants of said village prior to and until the 20th day of December, 1803, and is within the outboundaries of said village, when so run as to include the out-lots, common field lots, village lots and commons thereto belonging, then the plaintiff is entitled to recover in this action the land sued for. 6. If the jury believe from the evidence that the plat called an outboundary of Carondelet was not made by actual survey on the ground; that it was constructed by a draftsman in the office of the surveyor general for Illinois and Missouri; that it was made by retracing the lines of Brown's survey, purporting

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to be for commons of said village of Carondelet, of 1834, and the lines of the common fields ; that said survey of commons by Brown, of 1834, was fraudulently made, with intent to cheat and defraud the village of Carondelet and the inhabitants thereof, and that the plat of said survey of 1834 was constructed upon fraudulent returns made by said Brown—then the said plat of outboundary so constructed does not conclude or estop the plaintiff from recovering so much of the premises sued for as were actually claimed, used and possessed by the inhabitants of the village of Carondelet as commons belonging to said village prior to and until the 20th day of December, 1803. 7. If the jury find from the evidence that a direct line from Sugar-loaf mound to the north-east corner of the common fields of Carondelet was the true northern line of the commons of Carondelet ; that the specific land bounded north by said line from the Sugar-loaf mound to the said common fields' north-east corner, east by the Mississippi river, south by the village of Carondelet, and west by the front fence on the east line of the said common fields, was claimed, used and possessed by the inhabitants of said village as commons belonging to said village prior to and until the 20th day of December, 1803 ; that the premises sued for are within the said boundaries of said commons, and that at the time when Joseph C. Brown made the survey, purporting to be a survey of the commons of Carondelet in 1834, the inhabitants of Carondelet claimed before him on the ground, and pointed out to him on the ground the said line from the Sugar-loaf mound to the said corner of said common fields as the north line of the commons of said village ; and that said Brown run said line, for and at the request of the said inhabitants, as the north line of said commons ; and that said Brown fraudulently omitted to return to the surveyor general's office the said survey of said north line, and fraudulently returned an erroneous survey of another line as the northern line, nearly half a mile south of said Sugar-loaf mound—then the jury is instructed that the said survey of Brown of the commons of 1834, does not con-

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clude or estop the plaintiff from recovering in this action." The court gave the following instruction prayed by defendant: "1. All the right, title and interest of the United States in and to the commons of the village of Carondelet was vested in the inhabitants of said village by the acts of Congress of June 13, 1812, and of January 27, 1831. The United States surveys No. 3102 for Carondelet commons, and No. 3125 for St. Louis commons are each and all of them evidence of the extent and boundaries of the respective commons, so confirmed and relinquished by the United States to the said villages of St. Louis and Carondelet; therefore, if the land in controversy in this action is within the commons of St. Louis as surveyed by the authority of the United States, and not within the commons of Carondelet as surveyed by the United States authorities, the plaintiff can not recover."

The jury rendered a verdict in favor of defendant.

B. A. & D. W. Hill, for appellant.

I. The confirmations by the first section of the act of Congress of June 13, 1812, were not subject to the condition of survey. In this respect they are unlike the confirmations by the first board and by the recorder of land titles, which were of claims to be surveyed. Under such confirmations the title did not pass until the survey. (*Guitard v. Stoddard*, 16 How. 508; *Chouteau v. Eckart*, 2 How. 344; *West v. Cochran*, 17 How. 414; *Mackay v. Dillon*, 4 How. 445; *Carondelet v. McPherson*, 20 Mo. 193.)

II. The outboundary survey directed to be made in the first section of the act of June 13, 1812, is not conclusive against the claimant of a field lot outside of such survey. (*Milburn v. Hortiz*, 23 Mo. 532; *Tayon v. Hardman*, 23 Mo. 539; *Schultz v. Lindell*, 24 Mo. 567.) The outboundary is the only survey directed by the act of June 13, 1812; and if it does not conclude the claimant of a field lot outside of such survey, then no survey made under any subsequent act of

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Congress can affect the plaintiff's right to recover. (Guitard v. Stoddard, 16 How. 509.)

III. Surveys of confirmations under the act of March 3, 1807, have only been held conclusive in cases where the grant had no definite or certain location. The distinction between confirmations under the act of 1807 and the act of 1812 was carefully drawn in the case of West v. Cochran, 17 How. 416. See also Standford v. Taylor, 18 How. 409, and cases above cited. The survey of the St. Louis common, including as it does the premises in controversy, can have no effect whatever. The survey for St. Louis of the land granted to Carondelet as common is a mere nullity. (Stoddard v. Chambers, 2 How. 318; Grignon's Lessees v. Astor, 2 How. 350; Strother v. Lucas, 12 Pet. 450.)

IV. There was no question of estoppel in this case. The court below refused to admit any evidence of the proceedings upon the survey of the Carondelet common. If there be any force in the question of estoppel, the court erred in excluding the evidence offered by plaintiff. The United States were not bound by Brown's survey at any time after September 24, 1839. Estoppels must be mutual unless they be by matter of record. The mere fact of survey by the United States does not create an estoppel against the plaintiff. (Carondelet v. McPherson, 20 Mo. —.) The inhabitants must be shown to have accepted the survey as a correct one in order to be bound by it. From the record it appears that neither Carondelet or the United States have accepted Brown's survey. It appears to have been repudiated by both parties.

V. The commissioner of the General Land Office had power to disapprove the survey. (See 1 Land Laws, Senate ed.; Acts of Congress, of May, 1785, p. 11, 12; of July 23, 1787, p. 24, 33, 34; of May 18, 1796, p. 50; see also Part 2d of Land Laws, Sen. ed. p. 64, 85, 98, 153, 198, 199, 220, 395, 728, 729, 730, 733, 735, 736, 738, 739, 740, 742, 743, 744, 747, 748, 758, 759, 760, 785, 794, 801, 802, 803, 804, 805, 806, 809, 810, 819, 824, 838, 835, 900, 905, 912, 908, 944, 948, 962, 960, 996; see also Acts of May, 1800, id. p. 71-78;

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of March, 1804, p. 104, 110; of July 28, 1806, p. 152; of March 3, 1807, p. 154-7; of April 25, 1812, p. 211; of June 13, 1812, p. 217; of March 3, 1813, p. 232; of April 12, 1814, p. 243-4; of April 29, 1816, p. 278; of May 26, 1824, p. 398; of July 4, 1836, p. 552.) From all these acts of Congress, it will be manifest that the surveyor of Illinois and Missouri, after the act of 1816, was subject to the control of the President and the commissioner of the General Land Office, and that all the powers of the Department of State, of the Treasury, and of the War Department, over the public lands, were vested in the said commissioner by the act of April, 1812. By invariable custom, this power of control has been exercised over the surveyors, the registers, the recorders of land titles, and the receivers. The surveyor is an executive officer, and is directly under the control of the President. The theory and practice of the government requires that this control should be exercised. For the sake of convenience, special officers have been created to aid the President in the performance of his executive duties in relation to the public lands. It would be destructive of all the checks and balances of the government to hold that the act of a surveyor was a finality not subject to revision by the President and the Land Department. This power of revision is recognized in almost every act of Congress, and has been exercised ever since the organization of the government. The system of surveys and the operations of the Land Department are based upon this immemorial custom. It has never been doubted until lately that this control over the surveyors existed. Public policy requires that this long-settled practice of the Land Department, recognized in so many instructions through every administration, should not now be disturbed or questioned.

VI. There is no privity between the plaintiff and the defendant, through which the defendant can claim the benefit of an estoppel. The plaintiff has done no act by which the defendant can claim the benefit of an estoppel. (Cottle v. Sydnor, 10 Mo. 767.) The inhabitants of Carondelet must

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have had power to grant this land as common in order to pass it by estoppel. (Dugal v. Fryer, 3 Mo. 31.) The board of trustees of Carondelet had no power, in 1834, when Brown's survey was made, to pass the title to the land in controversy. No such power was vested in the board of trustees or in any body until the year 1851.

Bay, (city counsellor,) and *Todd*, for respondent.

I. The act of June 13, 1812, reserved the control of the designation of an outboundary line of the entire territory within which the grant of the act should operate. (Le Bois v. Brammel, 4 How. 464; Guitard v. Stoddard, 16 How. 494; West v. Cochran, 17 How. 403; Standford v. Taylor, 18 How. 409; Cabanné v. Lindell, 12 Mo. 184; 14 How. 514.)

II. If this proposition is not suffered to prevail, then it is insisted that the approved surveys, of particular classes of property confirmed by this act to claimants, for the purpose of defining their locations and of fixing the outboundary line, should be conclusive of their respective location.

III. As the right to run an outboundary was secured to the United States, and by consequence the right also to survey the locations of the kind of property embraced by the act of 1812, a survey under this act of the common of a Spanish town should be held conclusive of its location until another location should be shown of an official character by the Spanish or French authorities. (4 How. 464.)

IV. The record shows, by the evidence given and offered by plaintiff, that the common of Carondelet, without an authoritative survey, is of that vague and uncertain locality that makes it no property at all, in a court of justice, as against a grantee of the United States of land certainly defined for him by the United States. (16 How. 242.)

V. The survey of St. Louis common was made in 1832. St. Louis has governed, used and disposed of her common notoriously ever since according to this survey. Carondelet

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has never attacked this survey of the St. Louis common before the United States authorities. (Carondelet v. McPherson, 20 Mo. 205.)

RICHARDSON, Judge, delivered the opinion of the court.

In the consideration of this case, it must be assumed that the plaintiff could have made good the order to impeach and invalidate the survey of 1834 of the Carondelet common ; and the court, in excluding the evidence and giving the instruction which decided the case, must have held, either that the survey was binding though disapproved by the United States and rejected by the plaintiff, or that, admitting as proved every thing that was offered to be proved, the plaintiff had no standing in court without a survey, or that the opposing survey of the St. Louis common was conclusive on the rights of the plaintiff without a survey, or with one that did not include the *locus in quo*.

The case presents a conflict between the boundaries of the common of Carondelet as claimed by the plaintiff, and of the common of St. Louis as designated by a United States survey ; and the questions to be decided are, first, whether the plaintiff can recover without a survey, and, secondly, whether the survey of the common of St. Louis is conclusive on Carondelet as to the land included within it. Both parties derive their respective titles from the act of Congress of the 13th of June, 1812, and these questions must be determined by the construction of that law, and the judicial decisions which have been made under it: In reference to private claims, at least, it has been so often decided by this court and the Supreme Court of the United States, in every instance in which the subject has been considered, that the act *proprio vigore* operated to confirm the "rights, titles and claims" to the property described in the first section, that it is no longer an open question ; and the proposition is so well settled in so many cases, that the bare statement of it carries with it the familiarity and force of an axiomatic truth. (Soulard v. Clark, 19 Mo. 581.) The act was a complete divestiture of all the

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title of the United States, and nothing being reserved by the government, nothing was required to be done by the confirmee. Mr. Justice Campbell observes, in *Guitard v. Stoddard*, 16 How. 510, that "the act of 1812 makes no requisition for a concession, survey, permission to settle, cultivate or possess, or of any location by a public authority, as the basis of the right, title and claim upon which its confirmatory provisions operate. No officer was appointed to survey or to locate any individual right. All the facts requisite to sustain the confirmation—what were village or town lots, out-lots, common field lots or commons—what were conditions of inhabitation, cultivation or possession, to bring the claimant within the act—were referred to the judicial tribunals."

The act of May 26th, 1824, supplementary to the act of 1812, by the first section declared "that it shall be the duty of individual owners or claimants of town or village lots, out-lots and common field lots, in, adjoining, or belonging to the several towns or villages" of St. Louis, Carondelet, &c., whose lots were confirmed by the act of 1812, to proceed within eighteen months thereafter to designate their lots by proving before the recorder the fact of inhabitation, cultivation or possession, and the boundaries and extent of each claim. As this act spoke in a tone of command, it was supposed by some persons that the United States had the right to impose on the claimants the duty of proving their claims before the recorder, and that the assertion of the authority implied that some power existed over the subject which had been reserved. But it was decided by this court that the act of 1812 was absolute, depending only on the fact of inhabitation, cultivation or possession prior to the 20th December, 1803; (*Soulard v. Clark*, 19 Mo. 582; *City of St. Louis v. Torey*, 21 Mo. 243;) and the question was ably discussed and decided on like reasoning and in the same way by the Supreme Court of the United States, in *Guitard v. Stoddard*, 16 How. 494. The rights, titles and claims to commons were confirmed by the same section of the act that confirmed the titles to town lots, out-lots, &c.; and it will be observed that the first sec-

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tion of the act of 1824 does not mention the commons or include them within any of its requirements ; and if the claimant of a town or common field lot can recover without a survey, and in the face of a law that directs him to prove his claim and the boundaries and extent of it before the recorder, we can not appreciate the force of the reason that forbids the claimants of common from recovering without a survey.

By the first section of the act of January 27, 1831, the United States relinquished to the inhabitants of the towns or villages of St. Louis, Carondelet, &c., all the right, title and interest of the United States in and to the town or village lots, out-lots, common field lots and commons, in, adjoining and belonging to the said towns or villages, confirmed to them respectively by the first section of the act of 1812, to be held by the inhabitants of the said towns and villages in full property, according to their several rights therein. The second section relinquishes the right, title and interest of the United States to the town lots, &c., reserved for the support of schools by the second section of the act of 1812. The object of the second section of this act is readily understood, for it was necessary to divest the United States of the title to property, which had never before passed, but had only been reserved. But the object of the first section is not perceived, for there was nothing on which it could operate, and there was no interest remaining in the United States to be relinquished if the whole passed in 1812. No one pretends that the act was necessary to perfect any right to private claimants, and no argument can be drawn from it to prove that the rights, titles and claims to commons were not as complete by the act of 1812 as the rights and titles of claimants to town lots, &c.

The Supreme Court of the United States, in *Le Bois v. Brammel*, 4 How. 457, speaking of the act of 1812, in reference to the St. Louis commons, observes : " That this was a general confirmation of the common to the town as a community, no one has ever doubted, so far as the confirmation operated on the lands of the United States." And the learned Judge who delivered the opinion of this court in Caron-

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delet v. McPherson, 20 Mo. 201, remarked that, "according to the decisions of the Supreme court of the United States, the act of 1812 confirmed the lots to individuals, and the commons to the towns, without regard to the question whether there had or had not been a previous survey, and the boundaries of the claims thus confirmed were left open for proof in any litigation that might arise."

But the first proposition we are considering was directly before this court, and decided in the case of Carondelet v. McPherson. The case turned on the propriety of an instruction which asserted that the claim of the plaintiff could not be sustained without a survey which included the property in dispute. The instruction was declared erroneous, and it was held that the plaintiff's title to common might be established, without a survey, by proof of user prior to December 20, 1803. The only difference between the two cases is, that in this case both parties claimed under the same act, and the plaintiff was met by an approved and accepted survey of the St. Louis common, and this leads us to consider the second proposition.

The United States surveys of the commons of St. Louis and Carondelet are no doubt *prima facie* evidence of the extent and boundaries of the respective commons of said towns, and, when approved by the United States and accepted by the parties for whom they were made, were conclusive on the United States and the towns respectively, and all persons claiming subsequently to the grant under them or either of them. When a claim is not confirmed according to ascertained boundaries, but the confirmation is coupled with the condition that the land shall be surveyed, the confirmee can not controvert the survey that locates the claim. (Standford v. Taylor, 18 How. 412.) But it is settled, that confirmations under the act of 1812 were legislative grants without any conditions annexed, and that the act was operative to pass the title without any thing further being done by the United States. If so, neither the government, nor any department, nor officer under it, could impair the grant by an

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improper survey or otherwise. When, however, the survey of the St. Louis common was made and approved by the United States and accepted by the defendant, it was conclusive on the parties to it, for, as they agreed to it, they are bound by by it; but other claimants to land within its boundaries, who were not parties to it, were not concluded, and could controvert it so far as their claims were affected by it. (*Menard v. Massey*, 8 How. 314.) In the *City of St. Louis v. Toney*, 21 Mo. 243, a private claimant under the act of 1812, whose land was covered by the survey of the commons, was allowed to dispute its correctness, and to recover against the commons' title, without having complied with the act of 1824, upon proof of inhabituation and cultivation prior to December 20th, 1803. So also in *Vasquez v. Ewing*, 24 Mo. 31, this court decided that though the Supreme Court of the United States, in *Le Bois v. Brammel*, had established the doctrine that the approved survey of the St. Louis common, confirmed by the act of 1812, was equivalent to a patent, and that the title was as perfect from the government as could be obtained, and could not be assailed by the government nor any one claiming under it subsequently to the confirmation of the common, yet a private claimant within the boundaries of the survey, and asserting title under the same act of confirmation, might prevail against a person claiming under the city, upon actual proof of such facts as would bring him within terms of the first section of the act of 1812. The first section of the act that confirmed the "rights, titles and claims to town or village lots, and lots and common field lots," in the same breath and in the same words confirmed the titles and claims to the "commons in, adjoining and belonging to the several towns or villages" named in it. No distinction is made between the claimants of the different kinds of property designated in the act; and if the claimants of town village lots, out-lots, or common field lots can recover or without surveys, and are not concluded by surveys made for other claimants, no reason is perceived why a different rule should be applied to the claimants of common. If one can

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maintain ejectment without a survey, the other can; and if one is not concluded by a survey to which he has not assented, and to which he was not a party, the other ought not to be. Both are vitalized by the same power and are subject to the same conditions. The confirmation to each was a grant by legislation which carried the fee, and was superior to the dignity of a patent (*Grignon's Lessee v. Astor*, 2 How. 844); and to the extent of impairing the rights which the act conferred the power of the government was exhausted, and they were sacred from the improper interference of the highest executive officer, the head of a department, or any subordinate officer or agent; "but the boundaries of the claims thus confirmed were designedly, as we suppose, left open to the settlement of the respective claimants by litigation in the courts of justice." (*Mackey v. Dillon*, 4 How. 446.)

In our opinion the plaintiff might recover without a survey; was not concluded by the defendant's survey, nor by the survey of 1834, if it was not approved by the United States or assented to by the plaintiff, as showing the extent and boundaries of the Carondelet common. If, however, the survey of 1834 was approved, it would be *prima facie* evidence of the true location and boundaries of the Carondelet common, and the plaintiff could not recover without showing that it was incorrect and had never been recognized or accepted. No formal act is necessary to constitute an acceptance, but it may be inferred from a variety of acts and circumstances; and though the acts of the party going to show that the survey had been accepted must be proven as facts to the jury, it will be the province of the court to declare, as a matter of law, the legal effect of particular acts bearing on the question. Judge Napton concurring, the judgment will be reversed, and the cause remanded.

SCOTT, Judge. As only part of the claim of Carondelet for commons is presented by this record as it appears, I am not willing to express an opinion as to whether Carondelet can, on her bare confirmation alone, maintain an ejectment. There

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is no doubt the act of 1812 conferred title, but to what lands is a matter for judicial determination. It is for the courts to say whether a claim, although it has been confirmed, has that degree of definiteness which entitles it to be submitted to the jury. As the case now stands, I am not prepared to say that Carondelet would not be entitled to recover.

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CHARLOTTE, (of color,) Respondent, v. CHOUTEAU, Appellant.

1. Judicial notice will not be taken of the laws of a foreign country.
2. If the foreign law is unwritten it may be proved by parol; it will not be presumed to be in writing.
3. Foreign written laws must be proved by the laws themselves properly authenticated.
4. It is the province of the court to instruct the judges as to the meaning and effect of the written foreign law adduced in evidence; and this construction should be the same which is given to it in the jurisdiction in which it is in force.
5. The opinions of text writers, the decisions of the courts, and the evidence of persons skilled in the foreign law, may be resorted to and consulted to enlighten the court in construing and expounding the foreign written law.
6. In a suit for freedom the onus of proving his right to freedom must rest upon the plaintiff; but the law does not couple the right to sue with ungenerous conditions; he may prove such facts as are pertinent to the issue, and may invoke such presumptions as the law raises from particular facts.

Appeal from St. Louis Circuit Court.

The facts sufficiently appear in the opinion of the court.

Gantt, for appellant.

I. The documentary evidence adduced by the defendant, consisting of the articles of capitulation, the treaty of peace, the act of 1771, the act of 1790 and the act of 1793 demonstrate the existence of negro slavery and its legality from 1763 until 1793.

II. The testimony of Messrs. Gale and Reed as to the effect of the acquisition of Canada by the British government was incompetent and illegal; also their testimony as to the effect

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of various clauses in the treaty of cession, the king's proclamation, and the articles of capitulation.

III. There was no evidence whatever showing or tending to show that Rose was unlawfully held as a slave in Canada unless we regard as such the testimony of witnesses denying the legality of slavery there after 1768 and before 1793.

IV. It is part of the case of the plaintiff that Rose was held as a slave in Canada, and the testimony of the defendant shows that she was rightfully so held; on this point there is no opposing testimony whatever.

V. The verdict was flagrantly against law and the instructions of the court.

VI. The giving of the last instruction, at the instance of the plaintiff, was calculated to mislead the jury, or rather to encourage them to disregard every thing but their own sweet will in making up their verdict. It is no instruction to them, being the statement of a proposition too broad and abstract to be of any real service in guiding them to the truth.

A. J. P. Garesché and Cobb, for respondent.

I. Foreign laws are to be proven as facts and submitted under instructions to a jury. (Story's Conf. of Laws, § 1038, 1040; 1 Greenl. Ev. § 624-7; 1 Phill. on Ev. 401; 3 Watts & Serg. 76; Consequa v. Willing, 1 Pet. C. C. 225; 15 Serg. & Raw. 84; 9 Mo. 10; 3 Mo. 374.)

II. The instruction given to the court at the instance of the plaintiff was correct. The verdict was not against the evidence; and even if it were the Supreme Court would not reverse for that reason. (Goetz v. Ambs, 22 Mo. 170; Holliday v. Atterbury, 22 Mo. 512; Zimmerman v. Owens, 24 Mo. 97.)

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiff asserts her right to freedom on the ground that her mother, a negress, was born in Montreal, in Lower Canada, about the year 1768, and that her mother was not

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born a slave, because slavery did not exist in Canada at the time of her birth.

On the trial the plaintiff gave parol evidence tending to prove that her mother was born in Montreal about the year 1768, and that slavery did not actually exist and was not tolerated by law at that time in Canada.

The defendant, on his part, gave parol evidence tending to prove the actual existence of slavery in Canada in the year 1768; that slaves were recognized as property, and that Rose, the plaintiff's mother, was held and sold as a slave in Canada.

The defendant also gave the following documentary evidence:

First. The articles of capitulation of the surrender of Montreal by the French to the English forces, signed on the 8th September, 1760, by Lord Amherst, commander-in-chief of the British forces in North America, and the Marquis de Vaudreuil, governor and lieutenant general for the king of the French in Canada. The 27th article secured to the Canadians the free exercise of the Roman Catholic religion. The 47th article is as follows: "The negroes and panis of both sexes shall remain in their quality of slaves in the possession of the French and Canadians to whom they belong; they shall be at liberty to keep them in their service in the colony or to sell them; and they may also continue to bring them up in the Roman religion." "Granted, except those who shall have been made prisoners."

Second. The definitive treaty of peace concluded between the kings of Great Britain and France the 10th day of February, 1763, by which the French ceded and transferred to the crown of Great Britain Canada with all its dependencies. The king of Great Britain agreed to grant the liberty of the Catholic religion to the inhabitants of Canada, and that he would give the most effectual orders that his new Roman Catholic subjects might profess the worship of their religion according to the rites of the Romish church as far as the laws of Great Britain permitted; and that the French inhabitants, or others who had been the subjects of France in Cana-

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da, might retire with all safety and freedom wherever they should think proper, and might sell their estates to British subjects, or take away their property without restraint. But the treaty is, in every respect, silent in reference to the persons or property of the Canadians.

Third. The proclamation of George III, dated 7th October, 1753. It begins by reciting that extensive and valuable acquisitions in America had been secured to the crown by the treaty concluded at Paris on the 10th of February, 1763, and being desirous that his subjects, as well of his kingdoms as of his colonies in America, might avail themselves of the great benefits which would accrue therefrom to their commerce, &c., he had thought fit to issue his proclamation, thereby to publish and declare to his subjects that he had granted letters patent to erect within the countries and islands ceded and confirmed by said treaty four distinct governments, called by the names of Quebec (Canada), East Florida, West Florida and Grenada. It then designates the extent and boundaries of said governments, and declares as follows: "And whereas it will greatly contribute to the speedy settling our said new governments, that our loving subjects should be informed of our paternal care for the security of the liberty and properties of those who are and shall become inhabitants, we have thought fit to publish and declare, by this our proclamation, that we have, in the letters patent, under our great seal of Great Britain, by which the said governments are constituted, given express power and directions to our governors of our said colonies respectively that, so soon as the state and circumstances of our said colonies will admit thereof, they shall, with the advice and consent of the members of our council, summon and call general assemblies within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces in America which are under our immediate government; and we have also given power to the said governors, with the consent of our said councils and the representatives of the people so to be summoned as aforesaid, to

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make, constitute and ordain laws, statutes and ordinances for the public peace, welfare and good government of our said colonies, and of the people and inhabitants thereof, as near as may be agreeable to the laws of England, and under such regulations and restrictions as are used in other colonies; and in the mean time, and until such assemblies can be called as aforesaid, all persons inhabiting or resorting to our said colonies may confide in our royal protection for the enjoyment of the benefits of the laws of our realm of England; for which purpose we have given power, under our great seal, to the governors of said colonies respectively to erect and constitute, with the advice of our said councils respectively, courts of judicature and public justice within our said colonies, for the hearing and determining of all causes as well criminal as civil, according to law and equity, and, as near as may be, agreeable to the laws of England." There is nothing else in the proclamation that relates to this subject.

Fourth. The act of the British parliament of 1774, (14 George III, chap. 83,) entitled "An act for making more effectual provision for the government of the province of Quebec in North America." (30 British Stat. at large, 549.) There is nothing in this act that bears on the subject but the two following sections: "Sec. 4. And whereas the provisions made by the said proclamation in respect to the civil government of said province of Quebec, and the powers and authorities given to the governor and other civil officers of the said province by the grants and commissions issued in consequence thereof, have been found upon experience to be inapplicable to the state and circumstances of the said province—the inhabitants whereof amounted at the conquest to above sixty-five thousand persons, professing the religion of the Church of Rome, and enjoying an established form of constitution and system of laws by which their persons and property had been protected, governed and ordered for a long series of years from the first establishment of the said province of Canada—be it therefore further enacted, by the authority aforesaid, that the said proclamation, so far as the same relates to

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the said province of Quebec, and the commission under the authority whereof the government of the said province is at present administered, and all and every the ordinance and ordinances made by the governor and council of Quebec for time being relative to the civil government and administration of justice in the said province, and all commissions to judges and other officers thereof, be and the same are hereby revoked, annulled and made void from and after the first day of May, one thousand seven hundred and seventy-five. Sec. 8. And be it further enacted by the authority aforesaid, that all his majesty's Canadian subjects within the province of Quebec—the religious orders and communities only excepted—may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other civil rights in as large, ample and beneficial manner as if the said proclamation, commissions, ordinances and other acts and instruments had not been made, and as may consist with their allegiance to his majesty and subjection to the crown and parliament of Great Britain; and that in all matters of controversy relative to property and civil rights resort shall be had to the laws of Canada as the rule for the decision of the same, and all causes that shall hereafter be instituted in any of the courts of justice to be appointed within and for the said province by his majesty, his heirs and successors shall, with respect to such property and rights, be determined agreeably to the said laws and customs of Canada, until they shall be varied or altered by any ordinance that shall from time to time be passed in said province," &c.

Fifth. The act of the British parliament of 1790, (Geo. III, chap. 27,) entitled "An act for encouraging new settlers in his majesty's plantations in America," (37 British Stat. at large, 24,) as follows: "Whereas it is expedient that encouragement should be given to persons who are disposed to come and settle in certain of his majesty's colonies and plantations in America and the West Indies, be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords, spiritual and temporal, and

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commons in this present parliament assembled, and by the authority of the same, that from and after the first day of August, one thousand seven hundred and ninety, if any person or persons—being a subject or subjects of the territories or countries belonging to the United States of America—shall come from thence, together with his or their family or families, to any of the Bahama or Bermuda or Somers' Islands, or to any part of the province of Quebec, or of Nova Scotia, or any of the territories belonging to his majesty in North America, for the purpose of residing or settling there, it shall be lawful for any such person or persons, having first obtained a license for that purpose from the governor, or, in his absence, the lieutenant governor of said islands, colonies or provinces respectively, to import into the same, in British ships owned by his majesty's subjects and navigated according to law, any negroes, household furniture, utensils or husbandry and clothing free of duty; provided always, that such household furniture, utensils of husbandry and clothing shall not in the whole exceed the value of fifty pounds for every white person that shall belong to such family, and the value of forty shillings for every negro brought by such white person; and if any dispute shall arise as to the value of such household furniture, utensils of husbandry, or clothing, the same shall be heard and determined by the arbitration of three British merchants at the port where the same shall be imported—one of such British merchants to be appointed by the governor, or, in his absence, by the lieutenant governor of such island or province—one by the collector of the customs at such port—and one by the person so coming with his family. Sec. 2. And be it further enacted, that all sales or bargains for the sale of any negro, household furniture, utensils of husbandry, or clothing, so imported, which shall be made within twelve calendar months after the importation of the same (except in cases of the bankruptcy or death of the owner thereof) shall be null and void to all intents and purposes whatsoever." The third and last section relates only to the oath of allegiance required to be taken by the immigrant.

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Sixth. The act of the princial parliament of Upper Canada, passed July 9th, 1793. (Rev. Stats. of Upper Canada, chap. 8, p. 18.) The first section of this act recites that it is highly expedient to abolish slavery in the province, so far as the same may gradually be done without violating private property. It then repeals so much of the act of 1790 as enables the governor or lieutenant governor to grant license for the importation of negroes, and forbids any negro or other person subjected to the condition of a slave from coming or being brought into the province after the passage of the act to be subject to the condition of a slave. The second section provides that nothing in the act should be construed to extend to liberate any negro subjected to service, or to discharge him from the possession of his owner, who should have come or been brought into the province in conformity to the conditions of the act of 1790, or should have otherwise come into the possession of any person by gift, bequest or purchase. The third section declares that in order to prevent the continuation of slavery within the province, every child thereafter born of a negro woman who was a slave, should remain with his or her master or mistress until such child should arrive at the age of twenty-five years, and then be free.

At the request of the defendant, the court gave the following instruction: "1. If negro slavery existed by virtue of the laws and ordinances of the French government in Canada prior to the acquisition of that country by the English, and if the articles of capitulation, the treaty of cession, the acts of parliament of 1774 and 1790, and the king's proclamation of 1763, be correct copies of the genuine documents, then negro slavery was sanctioned and permitted by law in the country called the province of Quebec (which includes Montreal) at all times from the year 1760 to the year 1790." Other instructions were given to the jury, among which was the following, given at the plaintiff's instance: "Whether Rose was lawfully a slave in Cannda is a question for the jury to decide from the evidence on the trial."

These two instructions are incompatible, and both can not

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stand. The first declared as a matter of law the legal effect of the documents named in it, and the court in giving it assumed that it was its duty, and not the province of the jury, to pass on their meaning and operation. The second submitted every proposition of law in the case to be determined by the jury. If it was a conclusion of law from the documents read in evidence, to be decided by the court, that slavery was sanctioned in Canada, it was not proper to refer the question whether or not it was *lawful* to the jury; but if the last instruction was proper, though inconsistent with the first, the defendant can not complain; and if the first was correct, the other was wrong, and was calculated to mislead the jury to the defendant's prejudice. The quality of these instructions must be determined by the question whether it is the duty of the court or the jury to construe a foreign law.

It is universally admitted that courts do not take judicial notice of the laws of a foreign country, but they must be proved as other facts in a trial. It will not be presumed that a foreign law is in writing, and if it does not appear that it is written, it may be proved by parol. (*Livingston v. Maryland Ins. Co.* 6 Cranch, 280.) But, like the proof of every other fact, the best evidence of which the cause is susceptible must be produced; and as a witness may speak of the terms and nature of an unwritten contract, so he may testify of the existence of a foreign law; but as, when the contents of a written instrument are sought to be proved, the instrument itself must be produced, so foreign written laws must be proved by the laws themselves. (2 Starkie's Ev. 331; *Consequa v. Willing*, Pet. C. C. 229; *Robinson v. Clifford*, 2 Wash. C. C. 1; *United States v. Ortega*, 4 Wash. C. C. 533; *Dougherty v. Snyder*, 15 Serg. & Raw. 87; *Kinney v. Clarkson*, 1 Johns. 394; *Camparel v. Jernegan*, 5 Blackf. 375; *Gardner v. Lewis*, 7 Gill, 379; *McNeil v. Arnold*, 17 Ark. 155.)

The English cases are contradictory. In *Miller v. Hernwick*, 4 Camp. 155, Gibbs, Ch. J., said: "Foreign laws not written are to be proved by the parol examination of wit-

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nesses of competent skill. But where they are in writing, a copy properly authenticated must be produced ;" whilst Lord Denman, in Baron De Bode's case (8 Q. B. 250) permitted a witness to speak of the effect and state of the law in France resulting from a decree, but Patterson, J., dissented. In this country the question is well settled, but the cases are not uniform on the point whether the evidence of the existence of a foreign law is addressed in the first instance to the court or to the jury. In *Consequa v. Willing* it is said, that, whether the law or usage is sufficiently proven or not, is a question of fact for the jury, and so also in the case of the *State v. Jackson*, 2 Dev. 566, Ruffin, J., held that the "existence of a foreign law is a fact. The court can not judicially know it, and therefore it must be proved, and the proof, like all other, necessarily goes to the jury." And in *Moore v. Gwynn*, 5 Ired. 190, where the question did not arise on statute, but under the common law of Virginia, and the testimony was conflicting, it was decided that it ought to be left to the jury. But the decided weight of the American authorities goes to the length of establishing the doctrine not only that it is the province and duty of the court to instruct the jury as to the meaning and effect of a foreign law, when proved, whether the law is written or unwritten, but that the proof must be made to the court. Mr. Justice Story, in his *Conflict of Laws*, (§ 638,) says : "All matters of law are properly referable to the court, and the object of the proof of foreign laws is to enable the court to instruct the jury what, in point of law, is the result of the foreign law to be applied to the matters in controversy before them. The court are therefore to decide what is the proper evidence of the laws of a foreign country ; and when evidence is given of these laws the court are to judge of their applicability, when proved, to the case in hand." And Mr. Greenleaf, in his treatise on evidence, (1 Greenl. Ev. § 486,) quotes this section from Story, and incorporates it into the text of his work as containing the proper rule. Gibson, Chief Justice, observed, in *Sidwell v. Evans*, 1 Penn. 388, that "municipal law is a matter of

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compact, and as such the construction of foreign statutes, as in the case of any other written compact, belongs to the court. A plausible distinction might be taken in this respect between written and the unwritten law which necessarily rests on parol, but it seems to have been disregarded."

Though the Supreme Court of North Carolina, in the case of the State v. Jackson, decided that a foreign law was to be proved as a fact to the jury, held, that when it is established "its meaning, its construction and effect is the province of the court. It is a matter of professional science; and as the terms of the law are taken to be ascertained by the jury, there is no necessity for imposing on them the burden of affixing a meaning on them more than on our own statutes." And in a late case (5 Ired.) the same court decided that, where the question arises under a statute, it is the province of the court to decide both as to the existence of the statute and its proper construction. The case in Inge v. Murphy, 10 Ala. 897, turned on the construction of a foreign statute, and the Judge, in delivering the opinion of the court, observed: "It seems to us a self-evident proposition that laws, whether written, statute, domestic or foreign, must be ascertained in the general and always construed by the court, and equally so that it is manifestly not the province of the jury to place the construction upon it under any circumstances." Again, in a very recent case in Pennsylvania (Bock v. Lauman, 24 State Rep. 447,) the doctrine was reasserted that, though the law of another state is a matter of fact, it is not necessary to be found by the jury but by the court, and that all the analogies of the law inclined the court to regard the interpretation of foreign laws, whether written or unwritten, as falling within the province of the court.

It may be doubted whether the rule ought to be applied or can be practically enforced when the foreign law offered in evidence is unwritten, or is the common law of the country where it prevails; for in many instances, as in the case in 5 Ired. 190, the evidence may be conflicting, and all the witnesses may state the law differently, in which case it would

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be extremely difficult for the court to determine either the fact sought to be proved or to declare the legal effect of the evidence. And whilst it may be the better rule to submit as a question of fact the existence of a foreign law to the jury, we think that when it is written and received in evidence it is the duty of the court to construe it, and to instruct the jury as to its meaning and effect. We do not mean by the written law the statements of text writers or the decisions of courts; but these may be used with the evidence of experts to enlighten the court in expounding the foreign law; for when a foreign law has received a local construction, judicial decisions and law writers may be consulted, and professional witnesses may be examined for the purpose of ascertaining its meaning.

The first instruction, then, given by the court at the defendant's request, to the effect that negro slavery was sanctioned and permitted by law in the province of Quebec from 1760 to 1790 was proper, if the conclusion was legitimate from the facts stated in it; and it will therefore be necessary to recur to the evidence.

The plaintiff read the depositions of two learned and intelligent witnesses—Judges Reed and Gale—each of whom held high judicial positions for many years in Lower Canada. The former testified that slavery existed in Canada to a certain extent while under the dominion of the French, although he could find no law by which it was introduced prior to the year 1709, when, by an ordinance of the intendant of the colony, permission was given to the colonists to purchase negroes and slaves from the Indians, because they would be useful in the cultivation of the soil; that this ordinance would seem to have been made in order to confirm a practice which had previously existed, though there was no law of the French government authorizing slavery in Canada; that it had been doubted whether the intendant or any governor of a particular colony could establish therein such a general principle of public law as slavery; but, he says, "it is certain, however, that from the time of this ordinance and before

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slavery of negroes and panis, as therein stated, had been practiced and was still continued in the colony in 1736, as by an ordinance of Mr. Hoegnart, the then intendant, of the first of September of that year, a form for the emancipation of slaves was established and directed to be observed. So far the existence, if not the legality, of slavery would appear." He also states that the ordinance of 1736 assumed the legal existence of slavery. Judge Gale, the other witness, in speaking of the ordinance of 1709, says, it declared that it would be useful to the colony to hold negroes and Indians of a distant nation, called panis, as slaves, and therefore the negroes and panis, who had been or might be bought, should be held by the purchasers as their slaves; and that the ordinance of 1736 required masters who emancipated their slaves to do so only by written documents passed before public notaries, and declared other forms of emancipation void. In answer to the question whether slavery of negroes or other persons was recognized and allowed by law in Canada while the country belonged to France, he replied: "I believe that a modified system of slavery respecting negroes and some others was *de facto* exercised in Canada, in various instances, while the country remained under the French dominion; but I can not undertake to say that such *de facto* exercise of slavery was justifiable under sufficient legitimate enactment and a correct interpretation of the laws as they then stood." My opinion is to the contrary.

Both of these gentlemen prove that slavery existed in Canada from a period at least as early as 1709 to 1760; and though they say there was no act of the French legalizing it, we know that France permitted slavery in her West India colonies, and it can not be supposed that she was ignorant of the state of things in Canada for so long a time. And it may be assumed that slavery existed in Canada under the French rule, not only *de facto* but *de jure*. Slavery existed in nearly all of the North American colonies, though no law or royal decree has been found introducing it; but it was permitted, and afterwards sanctioned by laws concerning it, passed by

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colonial assemblies with the knowledge of the home governments.

The facts developed by the testimony of these witnesses in reference to the state of things in Canada before 1760, explain, if explanation was necessary, the purpose of the 47th article of the capitulation. It will be observed, by an examination of the articles of capitulation, that they make very few provisions affecting the inhabitants of Canada; and it is hardly probable that a besieged army, in the face of an enemy's guns, would stipulate in a separate article for the protection of an interest that had no real existence. No other allusion is made to the property of the inhabitants who intended to remain in the colony; and the 47th article is not only a clear recognition of the existence of slavery, but of the value of the interests connected with it. Only the most prominent objects seem to have engaged the attention of the retiring governor; for he secures nothing for his master's subjects but their religion and their slaves.

The national religion of England was protestant, and the French king was therefore jealous of the religion of his Canadian subjects; and the reason is obvious why the treaty of 1763 secured to the Canadians the enjoyment of the Roman Catholic religion, and did not stipulate for any other rights of conscience or property. No argument can be drawn from the silence of the treaty on the subject of slavery or any other peculiar institution; for the inhabitants of Canada, without any special guaranties, were entitled to all their rights of property, after the change of government, which they possessed under their former sovereign. The cession of a territory only passes the sovereignty, and does not interfere with private property. This is an established rule of public law, and is acknowledged and respected by all civilized nations. The subjects or citizens of a conquered or ceded country retain all rights of property which are not taken away by the new sovereign, and remain under their former laws until they are changed. (*Strother v. Lucas*, 12 Pet. 438; *Mitchell v. United States*, 9 Pet. 734; *Blacks. Com.* 107.) In the

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United States v. Percheman, 7 Pet. 87, Chief Justice Marshall, in speaking of the rights to property acquired in Florida before its cession to the United States, remarks : "The people change their allegiance ; their relations to their ancient sovereign is dissolved ; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule in case of conquest, who can doubt its application to the case of an amicable cession of territory ? Had Florida changed its sovereign by an act containing no stipulations respecting the property of individuals, the rights of property in all those who became subjects or citizens of the new government would have been unaffected by the change." This principle was recognized in England in reference to Jamaica as early as 1693, in Blankard v. Galdy, 4 Mod. 222 ; also by Lord Mansfield, in Rex v. Vaughan, 4 Burr. 2500. Slavery now exists in Louisiana, Missouri and Florida without any act of legislation introducing it, and none was necessary ; for, being in existence under the implied sanction at least of France and Spain in 1803 and 1819, it was continued, and was not dependent on any positive law for its recognition.

It is insisted that the royal proclamation of October 7, 1763, had the effect of abolishing slavery in Canada. Admitting that the king's prerogative included the power of making laws for the English colonies, we have searched through every clause of the proclamation to find a word or sentence which, in terms or by implication, remotely touches the subject. We have been directed to the clause of the proclamation set out in the first part of this opinion ; but, on looking at it, it will be seen that no new law is decreed, but only the assurance is given that, until provincial assemblies can be called, all persons inhabiting or resorting to the colonies of Quebec, East Florida, West Florida and Grehada, may confide in the royal protection for the enjoyment of the benefit of the laws of England, and that orders had been given to the governors of said colonies respectively to erect courts of justice for the hearing and determining of all caus-

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es, as well criminal as civil, as near as may be agreeable to the laws of England. The judges whose testimony we have noticed say that this proclamation introduced into all the colonies mentioned in it the common law of England, and that the genius and spirit of the common law are so hostile to slavery that wherever it is introduced or prevails it operates *ipso facto* to abolish slavery.

In 1763 the English acquired—besides Canada—Florida, Dominico, Saint Vincent and Tobago, in all which slavery existed; and though the proclamation expressly applied to all, it is well known, and these gentlemen admit, that it did not have the effect of abolishing slavery in Florida and the Grenadas. It is strange that it was potential for the purpose imputed to it in one place and not in the others. The Supreme Court of Louisiana remarked, in Seville v. Chretien, 5 Mart. 285, that they have not been able to find any trace of a legislative act of the European powers for the introduction of slavery into their American dominions. Yet it is an undisputed historical fact that slavery existed in nearly all the English colonies, now included in the United States, and that in each of them the “common law” was claimed as their birth-right, and causes in their courts were determined agreeably to the laws of England. If the opinion of the Canadian judges is correct, it is evident that the common law was not uniform in its operation, for it did not perform the work, in the thirteen colonies, ascribed to it in Canada. The common law of England was introduced in Missouri by an act of the territorial legislature of the 19th of January, 1816, and nobody ever supposed that it was equivalent to an act of emancipation.

In the case of the Attorney General v. Stewart, 2 Mer. 156, the question arose whether the proclamation we have been considering extended the laws of England to Grenada, and it was certainly doubted in that case whether they were carried by force of the proclamation to the province of Quebec. The Master of the Rolls, Sir William Grant, observes: “It seems to be supposed that this was done by the proclamation of

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1763, which is set forth in the report. With regard to three of the four governments to which this proclamation related—East Florida, West Florida and Grenada—I am not aware that any controversy as to the effect of it ever arose. Perhaps there may have been, with respect to them, other acts and instruments more directly expressive of his majesty's intention to introduce the laws of England. But as to the fourth—the government of Quebec—which was included in the same proclamation, and where it must have had the same legal effect as in the others, it became a matter of great and long-continued discussion whether the laws of England had thereby been generally introduced in abrogation of the ancient municipal laws of country. In a report made by the Attorney and Solicitor General in 1766, little other effect was ascribed to this proclamation than of extending to the inhabitants of Canada the benefit of the criminal law of England." But no matter whether or not the proclamation introduced the laws of England into Canada, or whether they produced any change as to the rights of property, it is certain that the act of parliament of 1774 repealed so much of the proclamation as related to the laws of England, and enacted that the Canadians within the province of Quebec might "hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other their civil rights, in as large, ample and beneficial manner as if the said proclamation" had not been made, "and that in all matters of controversy relative to property and civil rights" resort "should be had to the laws of Canada as the rule for the decision of the same."

The act of 1790 is only consistent with itself on the idea that it assumed the existence of slavery in Canada. The mention of negroes is only in connection with other property which is exempted from the payment of an import duty; and the prohibition on the sale of negroes or furniture, imported under the act within twelve months, was to prevent frauds on the revenue, and it implied that sales of negroes were lawful after the expiration of a year from the time they were

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imported. It is said that this act was for the benefit of British subjects whose homes were uncomfortable to them in the United States after our independence was achieved. This is doubtless true, but it is hardly probable that out of tenderness to them Parliament would have established in Canada, for their benefit alone, a system of slavery which had never before existed there, and which it is alleged is so repugnant to the genius of the common law.

The province of Quebec was divided into the provinces of Upper and Lower Canada by an order in council August 24, 1791, which took effect 26th December following. The act of 1793, passed by the parliament of Upper Canada, not only repealed the immigration act of 1799, but provided for the prospective and gradual emancipation of the slaves born thereafter. It assumed that there were other slaves in the province than such as had been imported under the license granted by the act of 1790; for the second section provided that the act should not apply to slaves then in being, who had been brought in under the act of 1790, or to such as had otherwise come to the possession of any person by gift, bequest, or purchase. And if there were no other slaves than such as had been imported under the act of 1790, there was no reason for mentioning them.

It is true that this law was the act of Upper Canada, which does not include Montreal; but it was passed very soon after the province of Quebec was divided, and if slaves were lawfully held in the upper part of the province before the division, it must be supposed that the law which permitted it operated uniformly throughout the whole province. The parliament of Upper Canada, at its first session in 1792, introduced the English law, quite as effectually as the king's proclamation could have done it, as the rule of decision in all matters of controversy relative to property and civil rights; and it could not have thought that the common law was effectual to abolish slavery, otherwise there would have been no necessity for the subsequent act of 1793.

If a controversy should arise in our courts as to whether

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slavery was authorized by law in Kentucky or Virginia, it is probable that no legislative act could be found in either state which, in express terms, legalized it; but the conclusion would force itself on the mind of a judge, and he would feel himself compelled to decide, that it was lawful, as a necessary inference from disconnected acts regulating the subject; and, in our opinion, if slavery existed in Canada under the French government, before the English acquired the country, it continued to exist and was lawful until it was abolished; and after a careful examination of the documentary evidence in this cause, and for the reasons which are here hurriedly given, we have arrived at the conclusion which the circuit court announced in the first instruction given for the defendant. The last instruction for the plaintiff is inconsistent with the first for the defendant, and was therefore improperly given. If the word "lawfully" had been omitted in the last instruction, it would have been unobjectionable; for though slavery was sanctioned by law in Canada, if in fact Rose was not a slave there, her children would not now be.

By omitting to notice the other instructions given for the defendant, our silence is not to be construed into an approval of them. The third instruction is very objectionable, for it implies that the plaintiff must make out her case by a higher degree of evidence, and that she must connect every link with more conclusive proof than is ever required in civil cases of other persons. If a negro sues for his freedom he must make out his case by proof like any other plaintiff, but the law does not couple the right to sue with ungenerous conditions; and he may prove such facts as are pertinent to the issue, and may invoke such presumptions as the law raises from particular facts. Our statute provides that in suits for freedom, "if the plaintiff be a negro or mulatto, he is required to prove his right to freedom;" (R. C. 1845, p. 533;) but this is not a common law rule of evidence, and, with this exception, we are not aware of any other rule peculiarly applicable to such suits. Judge Napton concurring, the judgment will be reversed, and the cause remanded.

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SCOTT, Judge, dissenting. What may be the province of the court in the interpretation of foreign laws for the benefit of the jury I do not deem it necessary to determine, as I conceive no such question is involved in this record. The question for the jury was, whether slavery existed in Canada. No statute was produced creating or establishing that institution which called for the interpretation of the court. From the fact that there were laws and documents, in which reference was made to slaves, or which contemplated a state of slavery, it was to be inferred that slavery lawfully existed in Canada. That inference was one of fact to be made by the jury. As the jury have found the fact, whose exclusive province it was to do so, the practice of this court, now established for a number of years, forbids that a judgment should be reversed because a verdict is against the weight of evidence.

MAGWIRE, Appellant, v. TYLER *et al.*, Respondents.*

1. A petition asserted an equitable right; the defendants filed their answer thereto; when the cause was called for trial, both plaintiff and defendants having announced themselves ready for the trial and hearing of the cause, the court *ex mero motu* dismissed the petition; *held*, that in thus dismissing the petition the court committed error.
2. In the case of a confirmation under act of Congress of March 3, 1807, where the confirmation is accompanied with the condition that the land be surveyed, if—the true location of the tract confirmed being in doubt—the legal representative of the confirmee appropriates the land as afterwards located and surveyed by the United States, and receives a patent therefor as thus located and surveyed, a person claiming the land confirmed under the confirmee as elsewhere located, by title acquired subsequent to the appropriation, can not dispute the propriety of the location as actually made. The legal representative of the confirmee, prior in point of time and of right, would have a prior right to assent to the location as made by the United States government; there being but one confirmation, one satisfaction in favor of the legal representatives of the confirmee exhausts the obligations of the government. (Per SCOTT, Judge.)

* RICHARDSON, Judge, having been of counsel, did not sit at the hearing of this case.—[REP.]

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8. In the case of a confirmation under act of Congress of March 3, 1807, where the confirmation is accompanied with the condition that the land confirmed should be surveyed, such survey, when made by the proper executive officers of the United States government, conclusively settles the question of the locality of the tract confirmed, and the courts, either of law or equity, can not locate the tract elsewhere. (Per NAPTON, Judge.)

Appeal from St. Louis Land Court.

This was a suit in the nature of a bill in equity. The plaintiff in his petition asserts title in himself to a tract of four by four or sixteen arpens of land embraced within United States survey No. —, for Louis Labeaume or his legal representatives ; and alleges substantially that on the 25th of June, 1794, Don Zenon Trudeau, lieutenant governor of Upper Louisiana, conceded to Joseph Brazeau a tract of four by twenty arpens ; that on the 9th of May, 1798, said Brazeau, by deed of that date, conveyed the tract of land, thus conceded to him, to Louis Labeaume, reserving to himself four by four or sixteen arpens of the southern part of said concession ; that said Brazeau continued to claim, possess and occupy the said tract of four by four arpens until he agreed to convey the same to Pierre Chouteau ; that after the making of said deed by Brazeau to Labeaume, Labeaume presented his petition to the lieutenant governor, stating in said petition in substance that he had purchased of Brazeau a parcel of land which had but a limited depth, and said Labeaume prayed that the lieutenant governor would "grant to him 360 arpens of land, including that which he had acquired from Brazeau—that is to say, twenty arpens in depth from the Mississippi, ascending the Rocky Branch, west quarter south, by sixteen arpens front along the Mississippi, to be taken from the descent of the road into the creek, which is the same front of the petitioner's land ;" that on or about February 15, 1799, the lieutenant governor acted upon said petition of said Labeaume and ordered that a survey should be made of the land petitioned for, and that he be put in possession thereof ; that on or about April 10, 1799, the Spanish government caused a survey to be made by Don Antonio Soulard, acting

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surveyor in the Spanish province of Upper Louisiana, for said Labeaume; which survey was intended and ordered to be made of the land that said Labeaume had asked for in his petition above mentioned; but the said surveyor Soulard, either by mistake or design, so made said survey as to include the whole of the four by four arpens of land which said Brazeau had reserved to himself in his said deed to Labeaume; that on or about September 22, 1810, the board of commissioners for the adjustment of land titles in the territory of Missouri, acting in pursuance of, and in conformity with, the laws of the United States in such cases provided, confirmed to Joseph Brazeau four arpens of the tract or parcel of land that was conceded to him as aforesaid, being the same four arpens reserved by Brazeau in his deed to Labeaume; that said commissioners, by the same act, confirmed 356 arpens to Labeaume;* that said commissioners on or about June 14, 1811,

* The following are the confirmations to Labeaume and Brazeau:

"September 3, 1806. The board met pursuant to adjournment. Present, the Hon. John B. C. Lucas and James L. Donaldson, Esq.

"The same [Louis Labeaume], claiming 374 arpens of land situate on the Mississippi, a distance of about two miles from the town of St. Louis, produces a concession, duly registered, from Zenon Trudeau, for four by twenty arpens, dated the 20th of June, 1794, and granted to one Joseph Brazeau; and another concession from said Zenon Trudeau to claimant for the said 374 arpens including the said four by twenty arpens, dated the 15th of February, 1799; a survey of the same taken the 20th of March and certified the 10th of April, 1799, together with a certificate by Zenon Trudeau of the sale of said four by twenty arpens by said Joseph Brazeau, reserving to himself four arpens in superficies; said certificate dated the 12th of May, 1798.

"Hyacinth St. Cir, being duly sworn, says, that the said Joseph Brazeau [obtained] the said tract of four by twenty arpens and cultivated the same in the years 1794-5-6; and, having sold the same to claimant, he did in the year 1797 put a tenant on the same, who actually cultivated it until the year 1799, when claimant moved on it; that he was then the head of a family, and did prior to and on the first day of October, 1800, actually inhabit and cultivate the same, and has continued on it to this day. The claimant abandoning his right to the aforesaid concession of four by twenty arpens and claiming immediately under the second—to-wit, that for the three hundred and seventy-four.

"The board reject the same, the said concession not being duly registered.

"The board adjourned till to-morrow, 9 o'clock, A. M. [Book No. 1, pages 515-7-9.]"

"Friday, September 22, 1810. Board met. Present, John B. C. Lucas, Clement B. Penrose, Fréderick Bates, commissioners.

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issued in favor of said Brazeau patent certificate No. 983 for said four arpens of ground, and ordered the same to be surveyed agreeably to the reserve in the deed of Brazeau to Labeaume; that Joseph Brazeau and wife, by deed dated July 26, 1816, conveyed the reservation of four by four arpens to Pierre Chouteau—in this deed it is recited that Brazeau had long before verbally sold said tract to said Chouteau; that in the month of November, 1817, Joseph C. Brown, deputy surveyor of the United States, by authority of the surveyor general of Illinois and Missouri, surveyed the said reservation; that said Brown, in his report of said survey, stated in substance and effect that he had surveyed two tracts in one†—the one confirmed to Louis Labeaume for 356 arpens—the other under Joseph Brazeau for four arpens—together 360 arpens, equal to 306½ acres, beginning at the mouth of the branch, the south-east corner of Easton's tract; thence down the Mississippi river to a stone at the mouth of an old ditch, the lower corner on the river; thence westwardly, &c.; that by deed dated June 1, 1826, Pierre Chouteau and wife conveyed said reservation of four by four arpens to George F. Strother;‡ that by deed dated September 3, 1830, George

"Louis Labeaume, claiming 874 arpens [see Book No. 1, page 417]. The board confirm to Louis Labeaume three hundred and fifty-six arpens, and four arpens to Joseph Brazeau, and order the same to be surveyed agreeably to a concession from Zenon Trudeau to Louis Labeaume, and as respects the four arpens, agreeably to a reserve made in a sale from Joseph Brazeau to said Louis Labeaume, recorded in Book C, p. 389, of the recorder's office.

"Board adjourned till Wednesday next at 3 o'clock, P. M. John B. C. Lucas, Clement B. Penrose, Frederick Bates." [See Book No. 4, pp. 502-5-8.]

"Friday, June 14, 1811. Board met; present, John B. C. Lucas, Clement B. Penrose and Frederick Bates, commissioners.

"Louis Labeaume—Book No. 4, 505—survey at the expense of the United States. Board adjourned.

"Cert. 982 and 983. John B. C. Lucas, Frederick Bates and Clement B. Penrose." [See Book No. 5, pp. 188-4-5.]

† The following is an extract from the report of the survey by Brown: "Surveyed for Louis Labeaume two tracts in one—the one confirmed in his own name for 356 arpens—the other under Joseph Brazeau for four arpens—together 360 arpens, equal to 306½ acres; beginning at the mouth of the branch, the south-east corner of Easton's tract, thence down the Mississippi river, bending therewith," &c.

‡ By this deed Chouteau conveyed to Strother the following tracts of land:

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F. Strother and his wife conveyed said four by four arpens to John Mullanphy and John O'Fallon, in trust for the St. Louis Marine Railway Company; § that in 1840 George F. Strother departed this life intestate; that Alexander Hamilton was appointed administrator of his estate; that by deed dated June 4, 1846, under an order of the probate court, said Hamilton conveyed said tract of four by four arpens to John

"All that tract or parcel of land granted to the said Pierre Chouteau in October, 1799, by Carlos Dehault Delassus, Spanish commandant, beginning at Roy's line, running north to Labeaume's south line, and extending from the river to the common field lots west, it being intended to convey to the said George F. Strother, his heirs and assigns, all the land contained within the said concession, except that heretofore sold by the said Pierre Chouteau, according to his several contracts, to be limited by the metes and bounds limited and fixed by the intention of the parties at the time of contracting. And one other tract of land containing four arpens, running on the river, and running back four arpens, making sixteen arpens, lying between the north line of the first described tract of land and the south boundary of the tract of land sold by Joseph Brazeau to Labeaume—said sixteen arpens being a tract or parcel of land confirmed to Joseph Brazeau and sold and conveyed by Joseph Brazeau to Pierre Chouteau, together with all the houses and appurtenances thereunto annexed. To have and to hold the said several tracts or parcels [pieces] of land with the tenements so intended and bargained to be sold, with every part and parcel thereof, with the rights and appurtenances, unto the said George F. Strother, his heirs and assigns forever; and the said Pierre Chouteau and Bridget his wife do hereby warrant the same free from the claim of themselves and their heirs and all persons claiming under them, except those who now have deeds recorded in the clerk's office of St. Louis, according to the modification of said claims aforesaid described. In witness whereof," &c.

§ By this deed two tracts, described as follows, were conveyed: "All that tract or parcel of land granted to Pierre Chouteau in October, 1799, by Carlos Dehault Delassus, Spanish commandant, beginning at Roy's line, running north to Labeaume's south line, and extending from the river to the common field lots west, except that heretofore conveyed by the said Pierre Chouteau according to his several contracts, to be limited and fixed by the intention of the parties at the period of contracting; and also with a reservation of a parcel of the said land contracted to be sold by the said George F. Strother to Martin Thomas, as surveyed as follows, &c. [Here follows a description of a tract of about six acres, located south of Labeaume's ditch.] Also another tract of land containing four arpens, running on the river, and four arpens back, making sixteen arpens, lying between the north line of the first above described tract of land and the southern boundary line of the tract of land sold by Joseph Brazeau to Louis Labeaume, and being part of the same tracts, pieces and parcels of land which the said George F. Strother purchased from Pierre Chouteau and Bridget his wife, by deed bearing date June 1st, 1826," &c.

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Magwire, plaintiff in this suit ; that the St. Louis Marine Railway company, through its surviving trustee, John O'Fallon, by deed dated January 2, 1852, conveyed said reservation of sixteen arpens to John Magwire, plaintiff in this suit ;|| that by virtue of the confirmation under the said act of Congress of March 3, 1807, the legal representative of Brazeau became the owner in equity of said sixteen arpens of land reserved by said Brazeau in his deed to Labeaume ; that on the 25th of March, 1852, a patent issued from the General Land Office of the United States, under the direction of the Secretary of the Interior, signed by the President of the United States, which patent was so worded as to embrace said reservation of four by four arpens confirmed to Brazeau ; that said patent was issued by the error or mistake of the Secretary of the Interior, and in violation of the right of the plaintiff and contrary to law ; that in 1796 or 1797, before the deed from Brazeau to Labeaume, Labeaume caused a ditch to be dug along the south end of the tract of four by twenty arpens, then belonging to Brazeau ; that this ditch was dug for the purpose of a drain ; that about the year 1803 Labeaume withdrew his fence from the line of said ditch and so located it as to exclude the four by four arpens ; that the true and proper location of the reservation of four by four arpens is north of said ditch called Labeaume's ditch ; that in 1816 Labeaume conveyed to William Chambers the tract acquired by him from Brazeau and the tract conceded to himself by the Spanish government ; that Chambers afterwards sold and conveyed

|| By this deed the Marine Railway company conveyed to John Magwire "the land belonging to or claimed by the St. Louis Marine Railway company in the city of St. Louis, north of the ditch called Labeaume's ditch." The deed recites the following resolution passed at a meeting of the stockholders of the said company : "*Resolved*, That the land belonging to or claimed by the St. Louis Marine Railway company north of what is known as Labeaume's ditch, being four arpens in front on the river, and four arpens in depth, and bounded east by the Mississippi river, and south by said ditch of Labeaume, and containing sixteen arpens, be conveyed to John Magwire ; and that John O'Fallon, surviving trustee, who holds the legal title to said land, be and he is hereby directed to make said conveyance to said Magwire, and deliver the same."

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an undivided interest of two-thirds to William Christy and Thomas Wright ; that it was the said Chambers, Christy and Wright, and persons claiming under them, who first set up a claim to said reservation of sixteen arpens ; that in the year 1823 Pierre Chouteau instituted an action of ejectment against Christy to recover possession of said reservation ; that he was compelled to submit to a nonsuit in consequence of erroneous rulings to the jury ; that in 1827 Strother instituted an action of ejectment against Christy, and was forced to take a nonsuit ; that said reservation of sixteen arpens, from 1799 or 1800 until about 1827, lay open and unenclosed, without fences or buildings, at which time a small building was erected on said land by one Lapsley ; that Lapsley vacated said building in 1831, from which time until 1843 the land remained vacant and unoccupied ; that Chambers, in 1843, erected a small building on said reservation ; that in 1852 the plaintiff, Magwire, instituted several suits in ejectment in the St. Louis Court of Common Pleas—*Magwire v. Vice*, *Magwire v. Cochran, &c., &c.*—to recover possession of parts of said reservation ; that in the suit against Vice a verdict and judgment was rendered against the plaintiff, Magwire, on the ground that he had not the legal title to the land sued for, and was therefore not entitled to the possession thereof ; that this judgment was affirmed on appeal to the Supreme Court of Missouri ; that plaintiff, Magwire, in 1852, conveyed a lot embraced in said reservation of four by four arpens to one West, who instituted an ejectment suit therefor in the Circuit Court of the United States against one Joseph Cochran ; that in this suit verdict and judgment were rendered in favor of the defendant ; that this judgment was affirmed by the Supreme Court of the United States on the ground that at the time of the institution of the suit the plaintiff, West, had not the legal title to the land sued for ; that plaintiff in the present suit, Magwire, has ever since his purchase of the four by four arpens, by all means in his power, by actions of ejectment and otherwise, been endeavoring to obtain possession of said sixteen arpens, but he has

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been hindered and prevented from holding possession by reason of his not having the legal title; that sometime in the year 1846 plaintiff entered peaceably into the possession of a portion of said tract, claiming the whole, and so continued in possession until 1849, when some of the defendants, with force and violence, expelled plaintiff's tenants, whereupon plaintiff's tenants (Carlisle & Keyser) instituted an action for a forcible entry and detainer, in which action a recovery was had and restitution awarded; that West, in January, 1855, reconveyed to plaintiff the lot conveyed by plaintiff to him in 1832; that in 1832 or 1833 the representatives and assignees made an attempt to obtain a patent certificate upon the survey of Brown, of November, 1817, with the design and intent to procure a patent from the government of the United States which would include the four by four arpens reserved by Brazeau; that the recorder of land titles refused to issue such patent certificate on the ground that the survey of Brown, of 1817, improperly included the reservation by Brazeau; that the surveyor general ordered a survey (No. 2974) of the confirmation to Labeaume, so as to include only 356 arpens; that Brown made such re-survey, leaving out or throwing off a strip on the west; that Chambers as assignee of Labeaume obtained, December 21, 1837, from the recorder of land titles a patent certificate, No. 1151, on said survey, No. 2974; that this certificate was issued upon the faith of representations made by Chambers that said survey No. 2974 did not include the reservation of four by four arpens; that said recorder soon after ascertained that said Chambers had misrepresented the facts in respect to said survey, and that said survey did include said reservation; that said certificate was obtained by fraud and misrepresentations of said Chambers, &c., &c. [The petition then proceeds to set forth the action of the recorder of land titles, of the surveyor general of Missouri and Illinois, of the Commissioner of the General Land Office, and of the Secretary of the Interior; that under the decision of the Secretary of the Interior, a survey of the confirmation to Labeaume was made, which is numbered

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3333, and includes the land in controversy ; that this survey was approved February 25, 1852, and bounds the confirmation to Labeaume, on the south, by Labeaume's ditch ; that under the authority and by virtue of instructions from the Secretary of the Interior, the confirmation of the Brazeau reservation was located south of Labeaume's ditch. This survey, numbered 3332, was approved February 26, 1852. The petition states that patent certificates and patents were issued on said surveys to Labeaume or his legal representatives, and to Brazeau or his legal representatives ; that said surveys were made without authority of law and are erroneous—survey No. 3333, in that it includes the reservation of four by four arpens north of Labeaume's ditch—survey No. 3332, in that it locates the said reservation south of said ditch ; that the land south of said ditch was never granted or confirmed to said Brazeau, nor was it ever reserved by him ; that defendants were active in procuring said surveys to be made ; that “the issuing of the patent certificates and patents thereon, as before stated, were procured and obtained by secret and fraudulent misrepresentations of the defendants, or some of them, by which the said action of the said Secretary of the Interior was procured ;” that plaintiff has always protested against the action of the Secretary of the Interior and against said surveys and patents. The petition then sets forth the portions of said tract held by the several defendants.]

The following is the prayer of the petition : “*First*, that this court, by its judgment and decree, will declare the said survey No. 3333 to be void and of no effect, and to vacate and set aside the same in so far as the same may or shall affect said four by four arpens of land reserved by said Brazeau ; *second*, that this court, by its judgment and decree, will declare the said patent certificate No. 1249, issued thereon, to be void and of no effect, and to vacate and set aside the same in so far as the same may or shall affect the said four by four arpens of land ; *third*, that this court, by its judgment and decree, will declare the patent aforesaid, issued upon said patent certificate No. 1249 to Louis Labeaume or

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his legal representatives, to be void and of no effect, and to set aside the same in so far as the same may or shall affect said four by four arpens of land; *fourth*, that this court, by its judgment and decree, will declare the said survey No. 3332 to be void and of no effect, and to vacate and set aside the same; *fifth*, that this court, by its judgment and decree, will declare the said patent certificate No. 1250, issued on said last mentioned survey, to be void and of no effect, and to vacate and set aside the same; *sixth*, that this court, by its judgment and decree, will declare that the patent issued on said patent certificate No. 1250 to Joseph Brazeau, or his legal representatives, to be void and of no effect, and to set aside the same; *seventh*, that this court, by its judgment and decree, divest out of the defendants, or out of all those who claim to have or hold any title or right in or to said four arpens (or sixteen arpens in superficies) that said Joseph Brazeau reserved to himself in his said sale and deed to said Louis Labeaume, and that the right or interest held or claimed by the defendants, or either of them, be, by the judgment and decree of this court, vested in the plaintiff; *eighth*, that by the judgment and decree of this court the defendants be required to surrender and yield possession of said four by four arpens of land, or of so much and such part or parts thereof as they or either of them may claim, possess and occupy, to the plaintiff, and that he, the plaintiff, may, by the judgment, order and process of this court, be put in possession of said land; *ninth*, that by the judgment and decree of this court the defendants may be required to account for and pay over to the plaintiff all the rents, profits, advantages, &c.; *tenth*, that the defendants be adjudged to pay plaintiff damages, &c.; *eleventh*, that by the judgment, decree and restraining order of this court the defendants or their agents may be enjoined and restrained from committing waste and injury, &c.; *twelfth*, that by the order, &c., the plaintiff have such other and further relief," &c.

The defendants filed an answer to the above petition. When the cause was called for trial, "the plaintiff appeared

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by his counsel and the defendants also appeared, by their counsel, both parties having announced themselves ready for the trial and hearing of the case; whereupon the court, after having examined the petition and answer, *ex mero motu* ordered the plaintiff's petition to be dismissed."

The following is the final judgment rendered by the court: "Now at this day come said parties by their respective attorneys, and thereupon come also the jury heretofore sworn in this cause; thereupon the trial progressed, and the court, having heard and examined the plaintiff's petition, and being fully advised of and concerning the premises, is of opinion that the plaintiff's petition does not state facts sufficient to show a cause of action against the defendants or either of them, nor has the plaintiff any right to have the relief prayed for in said petition; it is therefore ordered, adjudged and decreed by the court that the plaintiff's petition be and the same is dismissed without prejudice to the rights of plaintiff; and it is further ordered, adjudged and decreed by the court that the plaintiff pay the costs," &c.

Krum & Harding, Glover, Gamble, and Geyer, for appellant.

I. The dismissal of the petition *ex mero motu* by the court below was tantamount to a decision upon demurrer to the whole petition; and although the defendants put in their answer, yet, for the purposes of determining the question of error in the decision below, the facts charged in the petition are to be considered as admitted.

II. The legal title to the premises claimed by the appellant upon the facts stated in the petition, and according to the course of the decisions of the Supreme Court of the United States, must be admitted to be vested in Louis Labeaume or his legal representatives; but the equitable title or claim of the representatives of Joseph Brazeau follows the land in the hands of the present claimants. This proposition is maintained on the following grounds: 1. That the tract of land of 374 arpens confirmed to Louis Labeaume, and surveyed

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by Soulard under authority of the Spanish government, included the four by twenty arpens conceded to Brazeau, and as well that portion he reserved as that he conveyed to La-beaume. 2. That the surveys made by authority of the United States of the confirmation of 656 arpens to Labeaume, and 16 arpens to Brazeau, severed the whole from the public domain. 3. That the confirmations respectively to Labeaume and Brazeau having been severed from the public domain by the authorized act of the government of the United States, the rights of said confirmees respectively attached to the land, each to his own share or portion, from the date of the return of the official survey, and those rights were according to said confirmations. 4. That the government of the United States, from the time of the survey, had no longer any interest in the land embraced in said confirmations; and that it belonged to the judicial and not to the executive department of the government to settle conflicts between the confirmees. 5. That the rights of Brazeau or his representatives became fixed by the confirmation in his favor, and that right became definite and certain when the survey was made severing the land from the public domain. 6. That the patent issued by the executive department of the government to La-beaume, including all the land embraced in the confirmations to him and to Brazeau, does not have the effect to defeat the equities of the latter. 7. That the patentee holds the land in trust for the owners of the equitable interests herein.

III. The right of the Secretary of the Interior, or of any other officer of the executive department, to determine the rights of the claimants to the land confirmed to them respectively is denied. No such power belongs to the executive. The power claimed for the Secretary of the Interior, and which he assumed to exercise in this instance by directing the surveys to be made in the manner he did, and which was in effect to adjudicate upon the rights of the claimants, belongs to the judiciary; and in so far as the action of the Secretary of the Interior transcended his powers it has no force.

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IV. The location of the extended grant to Labeaume is not questioned; but the applicant claims that Brazeau was entitled to sixteen arpens (the quantity he reserved in his deed to Labeaume) within that extended grant, for the extended grant embraced the whole of the four by twenty arpens originally conceded to Brazeau. The confirmation to Brazeau was for sixteen arpens within the extended grant to Labeaume, which is apparent on the face of the act of confirmation itself. The survey made in 1817 of "two tracts in one," and which was designed to designate the exterior boundaries of the larger tract, and to sever this land confirmed from the public domain, more than any thing else, does not conflict with this view of the case.

V. This is not a case of rights acquired subsequent to the confirmation or issuing of the patent. It can not be said therefore that the patent appropriates the land included within it to the exclusion of Brazeau or his legal representatives.

Shepley and B. A. Hill, for respondents.

I. Even in admitting that the present case is not already decided by the case of *West v. Cochran* on the same subject matter and other subsequent decisions of the Supreme Court of the United States, yet a court of equity possesses no such power as is claimed for it in this case. It is asking the court to vacate one patent and to give title to land embraced within another to those who claim the land for which the vacated patent was issued. The utmost length that courts of equity have gone is, that when recognizing the validity of the patent they transfer the legal title to it from him in whom it is vested to another whom they deem equitably entitled to it. The party asking relief had title to that particular land, or he had title to none. In all the cases there is no question arising of identity of location as between two tracts of land. The question arising in this case is simply a matter of location, not of right. The plaintiff claims not *through* the patent, but antagonistic to it. If Magwire had stood in the position of asserting his rights as being the person equitably entitled

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to the benefit of the confirmation of the tract conceded to Labeaume, and that by fraud another person had caused the patent for that confirmation to issue to him instead of to Magwire, to whom it ought in equity to issue, he would have presented a case similar to those upon which courts of equity have acted. (4 Louis. 443; Stephenson v. Smith, 7 Mo. 610; 8 Pet. 75; 9 Cranch, 164; 2 Bibb, 484; 6 B. Mon. 290; 6 Dana, 128.) There is no question of prior right. The titles of the two parties are of equal equity, of equal age and value, and it is a pure question of location. 2. The relief sought can not be given without vacating a patent of the United States, which the court has no power to do. (9 Mo. 758.) This can be done only upon the relation of the attorney general of the United States. The representatives of Brazeau can not have two tracts of four by four arpens at the same time. 3. But it is not alone the patents that are sought to be operated upon; for, in order to do this, it is necessary to annul the survey for Brazeau, and to vacate so much of the survey of Labeaume as interferes with the location sought to be made for Brazeau. It is an attempt by bill in chancery to locate and survey a confirmation for the reason that the United States, whose duty it was to survey it, had not surveyed it in the right place. 4. But it will be said that by the confirmation the title passed out of the United States, and that there was only a mere ministerial act to be performed, and that a court could compel the proper officer of the United States to perform it by mandamus. Even admitting this, it does not help the plaintiff. The court would have no power to tell the surveyor general how to survey it. That is reserved to the United States, and they are to exercise it in their best discretion. 5. By his own showing plaintiff selected his forum for contesting this whole matter, that of the Land Department of the government. 6. The result is that, in carrying out the principle contended for, in every case of a survey by the United States of a confirmation, when the party for whose benefit it is made thinks it should be surveyed differently, he has a right to come into a court of equi-

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ty and ask the court to give them the land either owned by the United States or surveyed and patented to other persons.

II. The decision of the Supreme Court of the United States in *West v. Cochran*, 17 How. 403, completely covers this case. See also *Stanford v. Taylor*, 18 Howard, 410; *Kissell v. Public Schools*, 18 How. 19.

III. But the plaintiff says that he has never accepted the patent and survey. To this it is answered that plaintiff has no power to reject it, as he does not pretend to own the land covered by the survey and patent. He would have no right to reject the survey and patent even if the rights of others would not be affected by his action.

SCOTT, Judge. This is a proceeding in equity, and the plaintiff's right to a recovery is based on the pretension that in justice and good conscience he is entitled to the relief sought from the defendants. On the 19th of May, 1798, Joseph Brazeau, in a deed to Louis Labeaume, reserved to himself four by four arpens of a concession which was thereby conveyed from Brazeau to Labeaume. This reservation was also witnessed by Lieutenant Governor Trudeau, in a certificate dated the 12th day of May of the same year, endorsed on the concession for the purpose of authenticating the transfer from Brazeau to Labeaume. By the board of commissioners acting under the law of Congress of the 3d of March, 1807, respecting land claims in Louisiana territory, this reservation was confirmed to Joseph Brazeau or his legal representatives, as is maintained by the plaintiff. It is conceded on all sides that there was but one such reservation, and that the government of the United States was under obligation to make but one satisfaction of the claim or reservation of Brazeau. If those entitled by law to that reservation have had it located and have made an appropriation of it as located, there can be no valid claim to that reservation existing in any other person, nor can it be of any importance whether the location of the claim was made north or south of the Labeaume ditch. If those entitled to the claim are

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satisfied with the location as it has been made, it is not for third persons, claiming by a subsequent conveyance, to object to that location, and insist on its being placed in some other locality.

By a deed of July 26th, 1816, Brazeau having conveyed his reservation to Pierre Chouteau, Chouteau, by a deed of June 1st, 1826, conveyed the same to George F. Strother. This latter deed, by its terms, beyond all doubt, included the reservation of four by four arpens originally belonging to Brazeau, and by him conveyed to Chouteau. Strother, by a deed of September 3d, 1830, conveyed to John O'Fallon and John Mullanphy, in trust for the St. Louis Marine Railway company, the reservation as it was conveyed to him by Chouteau, reference being made to Chouteau's deed. It will not be contended, it is presumed, that the deed from Strother to the trustees of the Marine Railway company did not convey the reservation in as ample a manner as it was conveyed by Chouteau to Strother. The answer denies that the title of the Marine Railway company passed to the plaintiff by virtue of the deed of January 2d, 1852; and as it was agreed on the argument that any state of facts might be assumed consistent with the pleadings which would show that the plaintiff is not entitled to recover, we will take it that the Marine Railway company, without any regard to its location, conveyed away the reservation acquired from Strother by his deed of September 3d, 1830. Now, if afterwards that company conveyed its interest in the reservation, by the description of the land north of the ditch called Labeaume's ditch, to the plaintiff, then he took it subject to the preexisting rights of the company's alienees. Those alienees taking the reservation wherever it might be located, they or their assigns would have a right prior to that of the plaintiff to assent to the location; and if they should have appropriated the land as located and patented, there could be no right in the plaintiff to have it surveyed in any other locality. Indeed, if the reservation was conveyed by the Marine Railway company to its alienees as it was received from Strother, it is not easy to see how the

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plaintiff could derive any right, title or interest by a subsequent conveyance. If the conveyance to the plaintiff had been in as ample a manner as those to the prior alienees, he could not derive any title from it, and it can not be perceived how his situation is bettered by taking a deed for the company's land north of the Labeaume ditch. It will not be contended that the company's deed to the plaintiff was designed in any way to affect the rights of its prior alienees in the event of the reservation being patented south of the ditch.

How, then, does the case stand? They to whom the reservation rightfully belonged have appropriated it, and its survey and patent include the land as appropriated. Survey No. 3333 locates the reservation south of the ditch, and the patent on that survey conveys the land to Brazeau's representatives. Now as the representatives of Brazeau, prior in point of time and of right, have appropriated the land as located by the United States, how can there be any right in any other person to have that land located a second time? Such pretension can only find support in the idea that there were two reservations belonging to Brazeau—one north and one south of the ditch. As there was but one reservation, and as the government of the United States has satisfied its obligations to the legal representatives of that claim, there can not exist, in law or equity, any claim or right in any other person arising out of a conveyance subsequent to those under which the land had been previously appropriated.

We do not see what the deed of the administrator of Strother has to do in this controversy. Even admitting it was available for any purpose, we do not consider that there is any necessity for inquiring how far the deed from the plaintiff to Bogy would operate as an estoppel against his right of recovery in this action. The existence of this deed is averred in the answer.

I have not placed my opinion on the ground maintained by Judge Napton. Deference to the intimation of the Supreme Court of the United States, when this case was before it on a writ of error on its law side, disinclines me to enter

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on that question. It is obvious that if such an objection is tenable, unless the general government will issue a patent to each claimant of the same tract of land, the action of its officers in making a survey will be conclusive on the courts both at law and in equity. On the other hand, if the intimation of the court is carried out, then, by a change of the form of the action, the whole doctrine of the conclusiveness of surveys will be evaded.

We do not see how the action of the court below in dismissing the bill under the circumstances can be sustained. An answer to the petition was filed. If the parties had so wished, the answer might have been withdrawn and a demur-
rer entered. But that was not done. There was no trial but on the petition and answer. The bill was dismissed ; no facts were found. It does not appear why the petition was dismissed. The judgment will be reversed, and the cause remanded.

NAPTON, Judge. It was determined in the case of West v. Cochran, 17 How. 414, that in relation to confirmations under the act of 1807, where the claim was uncertain, and the confirmation is accompanied with the condition that the land should be surveyed, such survey is to be made under the authority of the United States by her officers ; and that the location is not a question for the investigation of the judi-
ciary. This principle is distinctly declared in the instruc-
tions of the judge who tried the case on the circuit and who subsequently delivered the opinion of the court at Wash-
ington. The principle is moreover applied to the very mat-
ter now in controversy here, as will be seen by the instruc-
tions, which are these : " We are of opinion that the United States reserved the power to locate, by survey, the land *con-*
firmed to Brazeau, and by such survey to separate it from the public lands and from the lands claimed by others, and to issue a patent therefor, as was done in this instance ; that this reserved power was vested in the executive department, whose acts, in this instance, *bound Brazeau and others claim-*

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ing under him; nor can they extend their claim and recover land beyond the boundaries described in the patent to Brazeau or his legal representatives." But this is the very matter now proposed to be inquired into by Brazeau's legal representatives, to-wit, that the fact of *where* this land is shall be investigated. It is true that one of the judges of the Supreme Court declared it to be understood, in the decision of West v. Cochran, that the equities of the parties were still open; but if the grounds upon which the ejectment was determined, both on the circuit and at Washington, are to be understood as the basis of the decision and judgment, it is not perceived how this declaration of Mr. Justice McLean can help the plaintiff's case.

If the assertion in this bill, that Brazeau's entire concession of four by twenty arpens and his confirmation of four by four arpens lay north of Labeaume's ditch, is to be assumed as a fact, the case might present a different aspect; but this assertion is coupled with an exposition of the title papers, with the concessions to Labeaume and Brazeau, the survey of Soullard, the confirmations—in short, with a complete history of the case. The confirmation to Brazeau produced is the identical confirmation which the Supreme Court passed upon in the case of West v. Cochran, and which they declared only operated upon land which the United States executive should subsequently designate. "Until the survey was made" the court say "*the plaintiff's title attached to no land, nor could a court of justice ascertain its boundaries.*" It strikes me that this is a very distinct ~~an~~nunciation, that the surveying department of the federal government settles the question of location, and that the courts have nothing to do with it. The principle is just as applicable in a court of equity as of law.

There is no doubt that where a complete title has emanated from the federal government to a specific tract of land, and an equity attaches to that land in behalf of some other person than the patentee, a court of justice, either state or federal, may enforce such equity, and transfer to its owner

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the legal title. This, however, proceeds upon the assumption that there is an equity against the United States to a specific tract of land. It can not be doubted that Brazeau's confirmation was at least an equity; but to what? To what specific land did Brazeau's equity attach? To the land within the confirmation, of course. But what land is within the confirmation, and who is to determine it? The answer settles this controversy. If it is a question of fact to be investigated and determined by courts of justice, the bill in this case is not subject to demurrer; but if, as the Supreme Court said in *West v. Cochran*, it is a question to be determined by the executive department of the United States, then Brazeau's equity is to the land which they designate, and not to that which we might determine. No doubt the acts of executive officers, federal or state, whether President or surveyor, if contrary to law, are void; and so any court of justice, federal or state, would decide. But the Supreme Court declares that the law itself, the act of 1807, has entrusted the surveyor with authority to determine where this confirmation is, and that until a survey is made the confirmee has no standing in court. If injustice is done him, it is by the political sovereignty, and to redress such injuries is not within the province of courts.

This controversy is obviously purely one of locality. Pursuing it through all its ramifications, and looking at it in all its diversified shapes, it still resolves itself at last into this, and nothing else. There is no dispute that Brazeau had a confirmation; there is no dispute that this gave him at least an equitable, if not (as was once supposed) a legal, title; there is no dispute that a court of justice, either state or federal, which has jurisdiction, will enforce this title; but the dispute is, where is the land confirmed? Who is to decide this? I am laboring under a singular delusion if I am mistaken in saying that the Supreme Court of the United States have deliberately adjudged, in reference to this very case, that the United States surveyor is alone to determine this question.

That the case of *West v. Cochran* is not misunderstood is

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seen by what the same court have since said in *Kissell v. The Public Schools*, 18 How. 19. "Our opinion is that the school lands were in the condition of Spanish claims after confirmation by the United States, without having established and conclusive boundaries made by public authority, and which claims depended for their specific identity on surveys to be executed by the government. The case of *West v. Cochran* lays down the *dividing line between the executive and judicial powers* in such cases, to-wit: that until a designation, accompanied by a survey or description, was made by the surveyor general, the title attached to no land, *nor had a court of justice jurisdiction to ascertain its boundaries.*" In *Stanford v. Taylor*, 18 How. 412, the Supreme Court say: "Where the claim has no certain limits, and the judgment of confirmation carries along with it the condition that the land shall be surveyed and severed from the public domain and the land of others, there it is not open to controversy that the title attaches to no land; nor has a *court of justice* any authority in law to ascertain and establish its boundaries, this being reserved to the *executive department.*"

These cases do not proceed upon any distinctions between legal and equitable titles, or legal and equitable remedies. They are based upon a division line between the executive and judiciary departments, and assert that the latter have no jurisdiction of this question of location, which Congress have assigned to the former in certain enumerated cases, and that this is one of the cases referred to.

The entire scope of this bill is simply to ask the court to locate the Brazeau reservation within the lines of a tract confirmed to Labeaume, and to which Labeaume has a survey and patent. The whole argument to support this application is founded on the assumption that Brazeau's confirmation is to a *special tract* of land, and this specific tract of land lies within Brazeau's patent. But it has been authoritatively decided that Brazeau's confirmation was not specific, but was merely to such lands as the government surveyor should point out. The surveyor has determined its locality, and

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that is not at the place where the plaintiff insists it ought to be. He is then without any equitable title to any specific tract if he declines to recognize the survey of the government; and if justice has been done through mistake or fraud, this is not the forum, or this proceeding the remedy, by which it can be corrected. If this court can now declare to him that his land is within Labeaume's survey, and is not where the government has located it, we must do so upon the ground that his confirmation gave him an equitable title to a specific piece of ground—one that could be located by the courts without the aid of surveyors; and consequently that any location of such tract by a government surveyor would merely be evidence of its locality, the propriety of which would be for the decision of courts of justice as in ordinary surveys of complete titles. But this is distinctly at variance with my understanding of the opinion of the Supreme Court of the United States in relation to this identical confirmation.

Upon a point of practice it is agreed that the judgment be reversed.

GARRETT, Plaintiff in Error, v. CITY OF ST. LOUIS, Defendant in Error.

1. The second section of the act of February 28, 1853,* amendatory of the charter of St. Louis of March 8, 1851, is constitutional in so far as it required that in paying the value of land taken for the opening, widening or altering of a lane, alley, street, &c., the city should pay the value to the public generally of the proposed improvement, and that the balance should be assessed "against the owner or owners of the property fronting on such lane, alley, street, avenue, wharf or square, and in the blocks next adjacent, on either side or end thereof, according to the value of the property so assessed and in the proportion that the owners thereof may be respectively benefited by the proposed improvement."
2. Such assessments against adjacent owners in respect of the benefits received by them from the opening, widening or altering a street, &c., are a constitutional exercise of the taxing power.

25	505
96	506
32a	506
25	506
100	306
25	506
106	442
107	312
25	506
110	455
25	506
56a	640
25	506
131	23
25	505
140	564
25	506
156	546

* The following is the fourth section of the sixth article of the charter of St. Louis as amended by the second section of the act of February 28, 1853: "Sec.

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Error to St. Louis Land Court.

This was an agreed case submitted to the St. Louis Land Court under article 20 of the practice act of 1849. The following is the agreed case as submitted : " The following facts are agreed upon between Peter Garrett, as plaintiff, and the City of St. Louis as defendant, and hereby submitted to the judge of said court for his decision thereon, which it is hereby agreed shall be entered as the judgment of the court, from which either party may appeal to the Supreme Court of the State. Under the charter, acts of the legislature, and ordinances of the city of St. Louis, the mayor was required to open Main street, and, in order to do so, to condemn whatever property it was necessary to take for that purpose ; and on the 22d day of November, 1853, a jury was empanelled as the law directs to assess the value of the land so taken, who found that the land of said Peter Garrett, so taken to widen said street, was worth, without reference to the proposed improvement, the sum of \$768.45, and that the buildings on the land so taken were worth \$1440—making in the aggregate the sum of \$2208.45. The same jury proceeded, according to the statute and ordinances in such case made and provided, to assess the benefits derived by property holders adjacent to said improvement, and they found that the lot of land belonging to said Garrett—off which the land valued as above

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4. It shall be the duty of the jury first to ascertain the actual value of the land proposed to be taken for the opening, widening, or altering of a lane, alley, street, avenue, wharf or public square, without reference to the proposed improvement; then, for the payment of such sum, to assess against the city the value to the public generally of the proposed improvement, and to assess the balance against the owner or owners of the property fronting on such lane, alley, street, avenue, wharf or square, and in the blocks next adjacent on either side or end thereof, according to the value of the property so assessed and in the proportion that the owners thereof may be respectively benefited by the proposed improvement; and the sum or sums to be paid by the owner or owners of the property respectively benefited by the improvements, as ascertained by the jury, shall be a lien or liens upon the property so charged, and shall be collected as provided by ordinance. The verdict shall be signed by each juror and delivered to the mayor."

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stated at \$768.45 [was taken]—was benefited to the amount of \$763; so that, when he demands his money awarded to him by the jury, the City of St. Louis refuses to pay unless the benefits assessed against his lot are deducted, which would leave coming to him \$1445.45. He contends that the city should pay him the full amount of the value of the land and improvements, and insists that the assessment of benefits is unconstitutional and void, and not in any way binding on him. It is further agreed that the said Garrett, at the time of the trial, insisted that the assessment of benefits as against him was unjust, illegal and unconstitutional, and protested against its being done. The city says it is legal and constitutional, and that it should be deducted from the amount at which his property was valued. The question now referred to the court is whether the assessment of benefits under the law is unconstitutional; and if the court find it is, then let a judgment go against the city for only the sum of \$1445.45, and the judgment for costs against said Peter Garrett. The question of interest in the [this] event is referred to the court. If the court find that the assessment of benefits under the statute is unconstitutional and therefore illegal, the judgment shall be rendered against the city for the full amount of \$2208.45 and the costs."

The court rendered judgment against the City of St. Louis in favor of Garrett for \$1445.45, with interest from November 22, 1853, and against the plaintiff, Garrett, for the costs. The court overruled a motion for a review made in behalf of plaintiff Garrett.

Hudson & Thomas, for plaintiff in error.

I. So much of the act of February 28, 1853, as authorizes the assessment on benefits is unconstitutional. (Constitution, art. 18, sec. 7; 2 Dall. 310; *The People v. Mayor of Brooklyn*, 6 Barb. 209; 5 Dana, 28; *Rice v. Turnpike*, 7 Dana, 81.)

Bay, (city counsellor,) for defendant in error, cited 3 Watts, 292; 13 Pick. 60; 1 Green, 196; 1 Louis. 1; 8

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Wend. 85 ; 15 Wend. 376 ; 24 Wend. 65 ; 7 Hill, 9, 28 ; 14 Ohio, 541 ; 5 Blackf. 384 ; The People v. Mayor of Brooklyn, 4 Comst. 420 ; Newby v. Platte County, 25 Mo. 258.)

NAPTON, Judge, delivered the opinion of the court.

The only question in this case is the constitutionality of the second section of the amended charter of St. Louis, passed February 23, 1853. This section, among other provisions, authorizes the city council to open a street; and when for this purpose it becomes necessary to take private property, it provides the following mode of ascertaining the compensation. After notice to the owner, the mayor is directed to empanel a jury, whose duty it is made to ascertain the actual value of the land proposed to be taken, without reference to the proposed improvement. To pay the sum thus ascertained the city is taxed in an amount equal to the value of the improvement to the public generally, and the remainder is assessed against the property fronting on such street, and in the blocks next adjacent, on either side or end thereof, "according to the value of the property so assessed, and in the proportion that the owners thereof may be respectively benefited by the improvements." Where, under this provision, the entire lot is taken for the street, it is plain that nothing more has been done than an exercise of the right of eminent domain, and in a mode in strict conformity to the constitution. The owner of the lot taken has no cause for dissatisfaction, since he is paid the full actual value of his lot; and the means adopted by the city to raise the funds for this payment are a matter of indifference to him. But where the entire lot is not taken, or where the owner has other land on the same street, the question arises whether he can be compensated in the mode provided by the charter.

That this assessment upon the lot owners fronting on the street is an exercise of the taxing power, seems too plain to admit of argument. Whether it is a *bona fide*, legitimate and constitutional exercise of that power is the matter to be considered; but that it is an attempt to exert this taxing power,

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and not the power of eminent domain, may, I think, be assumed. In the case of Newby v. Platte County, this court held that the assessment upon land owners, whose lands were taken under our railroad laws, for sums proportioned to the benefit they received from the road, was an exercise of the taxing power; and without meaning to express any concurrence in or dissent from this view, it is clear that the position assumed in that case necessarily includes the assumption we have just made. The views entertained in that case were attended with difficulties which do not embarrass this. If the assessment for benefits in the case of the railroads was an exercise of the taxing power, then the tax was levied only upon those whose lands were taken, and not upon other lands abutting on the line of the roads where no part of them was taken by the companies. Here the assessment is upon all who own property on the street, whether any part of their property is taken for the improvement or not.

It is admitted on all hands that the power of taxation is confided to the legislative department of the government; and the manner in which it is to be exercised, the persons and things upon which it is to operate, are left entirely to the discretion and judgment of the legislature, except where the constitution has imposed restraints. The only provision on this subject in our constitution is "that all property subject to taxation in this state shall be taxed in proportion to its value." There is another provision in relation to property of the United States, but that has no bearing on the question now under consideration.

It may be doubted whether this provision of our constitution, requiring an *ad valorem* tax upon property when property is the subject of taxation, was designed to apply to local assessments for local purposes; whether it was not intended as a restraint upon the legislature only in passing general revenue laws. But waiving this question for the present, and conceding that the restriction applies to every kind of taxation upon property, it still remains to be considered whether the local assessment here disputed is a tax upon pro-

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perty within the meaning of the restrictive clause referred to ; and, if it is, whether the constitutional injunction has been disregarded in the provisions of the St. Louis charter.

This nineteenth section of our bill of rights does not deprive the legislature of any power of taxation, nor does it confer any. That department of the government possesses every species of taxing power with or without this clause. What shall be selected by the legislature as objects of taxation is as much within the discretion of that body, with this provision in the constitution, as it would have been without it. Where the legislature do, however, undertake to exercise one branch of the taxing power—that is, to levy a tax upon property—they must conform their action to this constitutional requisition. They must tax property according to its value, and not specially without regard to value. But when the legislature chose to exercise some other branch of the taxing power, they are left entirely untrammeled by this clause of the bill of rights. They may tax and do tax a variety of professions and pursuits and occupations ; and in such case their action is under no other control but such as responsibility to their constituents, a regard to their own interests, and a sense of duty, may create. It is true that in one sense all taxes may be said to be taxes upon property, since they are to be collected in money, and money is property. *Indirectly*, it is property that is reached by every species of taxation. Hence I have heard it maintained that a tax on a merchant's license is a tax upon property—seeing that the legislature, in fixing the amount of the taxes, have thought proper to regulate it by the amount and value of merchandise purchased or disposed of between certain intervals. And in this sense a tax *per caput* may be also called a tax upon property ; for a man's property and not his head can only be taken to pay it. But this is not the sense in which a property tax is to be understood when it is referred to in the constitution or legislative enactments.

In this case the city of St. Louis is taxed to the extent that she is benefited, and each owner of a lot fronting on the

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street is taxed in proportion to the value of his lot and the benefit such improvement is to him. The tax is a combined one, based upon the present value and increased value produced by the improvement. The benefit for which the owner of the lot is taxed is not the benefit to the public at large, or to the city of St. Louis, or to any other person whatever, but to the owner of the lot. The phrases "benefits" and "increased value" may therefore be regarded as convertible terms; and if the constitutional provision referred to is to be considered as applicable to this kind of taxation, it would seem that the spirit, if not the very letter, of its injunctions has been embodied in the act. The tax is exactly proportioned according to the "*increased value*" of the lot, which is the same thing as the value of the "benefit" which the owner receives from the improvement.

It will be further observed that the tax in this case is not confined to the lot owner, a portion of whose lot has been taxed, but is levied upon all other lot-owners on the street, whether any portion of their lots is required for the improvements or not; and it is levied upon all according to the same rule of assessment. The compensation, which the legislature have provided for persons whose lands are taken for railroads, is diminished or abated by the benefits which the road confers upon him; and if this set-off is to be regarded as a tax, then it is levied only on those persons whose lands are taken, and not upon those whose lands lie directly on the side of the road, but through which the road does not pass. The St. Louis charter conforms more nearly to the spirit of the constitution, and is every way more just. Not only the citizen whose lot is taken, but every other lot owner on the street proposed to be opened, is taxed for the improvement, and the tax is apportioned according to the value of the lot and the value of the improvement to such lot.

The tendency of recent legislation, in states where great additions to population and wealth and multiplied railroads and other artificial channels of trade have induced caution, has been to exclude all considerations of benefit to the pro-

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perty holder in computing the compensation to which he is entitled when a portion of his property is taken from him by the state in its exercise of eminent domain. Here, as yet, the question has been one of but little practical importance ; and until very recently has scarcely ever been the subject of litigation or investigation. We have not as yet many miles of railway, nor has the great body of land in the interior yet attained great value. By restricting the benefits, which the legislature have declared may be set off against the value of land taken for a public improvement, to such as are peculiar to the land owner and not shared by others whose land is not taken equally with him, growing dissatisfaction with existing legislation will probably be checked. It is evident that the advantages or benefits spoken of must have some limit. If an owner of land on the line of a railroad, part of which was taken for the road, should happen to own another tract half a mile from the road, the benefits which this last tract would receive from the improvement would not be considered ; and yet such increased value of this second tract would be practically and in fact a benefit remotely derived from the road. But the constitution intends to place the public burdens upon all, and, to do this, pays the proprietor of land for what is taken by the public. If he is paid in advantages which the community at large, whose land is not taken, enjoy equally with himself, the spirit of the provision might be said to be violated. His loss is certain and specific, and in relation to the land which is not taken he only receives the same benefit which others receive who have sustained no loss. These views are very forcibly presented by Judges Tucker and Brockenbrough in the case of the James River and Kanawha Company v. Turner, 9 Leigh, 818. The act of the Virginia legislature, substantially like ours, declared that the valuers "should combine therewith (that is, with the value and injuries to the land taken) a just regard to the advantages which the owner of the land will derive from the construction of the road or canal." In construing this, the court of appeals held that the advantages alluded to, and which the assessor was to

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regard, were such advantages as particularly and exclusively affected the particular land, a portion of which was condemned, and not advantages of a general nature, which may be derived to the owner in common with the country at large from the improvement. Our construction of the railroad laws has been in accordance with this decision.

But whatever may be thought of the clauses of the railroad laws which allow the land owner to be compensated in benefits—whether they be held to be an exercise of the taxing power or of the eminent domain, and, if the former, whether they conform to the constitutional requisition in relation to property taxation or not—it is clear that the section of the St. Louis charter now under consideration operates by virtue of the taxing power, and we are also satisfied that it is no violation of the nineteenth section of the bill of rights. It conforms, as we have said, to the spirit of this constitutional provision ; and if necessary we might go farther and declare that, in our judgment, the tax in question is not such a property tax as is within the meaning of that provision. The tax is local and for local purposes, and is a tax upon benefits and not directly upon property. It is based upon a principle which seeks not merely to avoid a breach of a constitutional restriction, but commends itself to our notions of equity and justice. The cost of the public benefit is made a public burden, and the expense of the individual benefit is placed upon the shoulders of the person who receives it. The question is not whether individual instances of injustice and oppression may not occur in the execution of this law ; it is not whether the tax will produce perfect equality of burdens, nor whether the power entrusted to this corporation may not be abused. We know too well that, under any system of taxation, these things may and do happen. There are evils not within the power of courts to remedy. It is for the legislature to guard against them ; and we must, in justice to them, say that this charter seems, in the provisions we have been called upon to consider, as carefully framed to prevent these evils as the nature of the case would permit.

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We may add that, in support of the conclusions we have reached, there is a current of authority in the highest tribunals of other states scarcely interrupted by conflicting decisions. (*The People v. Mayor of Brooklyn*, 4 Comst. 420; *Livingston v. Mayor*, &c., 8 Wend. 101; *Beekman v. Saratoga & S. R. R. Co.* 3 Paige, 45; *Stricker v. Kelly*, 7 Hill, 9; *Oaky v. Mayor*, &c. 1 Louis. 1.)

The case of *The People v. Mayor of Brooklyn*, 6 Barb. 213, is the only case in New York, to which our attention has been directed, where the question has been directly determined in opposition to this view. That decision was reviewed and overruled by the court of errors; which circumstance is calculated to destroy its authority in that state, but would not and ought not to impair its value here, if the reasonings and conclusions of the court were such as to command the assent of our judgment. But that, in my judgment, is not so; neither the arguments nor conclusions are satisfactory. The court declare the power exercised by the legislature to be that of the eminent domain; and this is true where any portion of a lot is taken for the improvement, but is plainly not true when the assessment is upon those whose lots are not touched. When such persons are assessed it can only be under the taxing power, since the power of eminent domain operates only on individuals and "without reference to the amount or value exacted from any other individual or class of individuals;" but taxation "operates upon a community or upon a class of persons in a community, and by some rule of apportionment." When, therefore, it is clear that this assessment upon one class of lot holders is an exercise of the taxing power, there is no reason why it should not be held to be an exercise of the same power upon the other class, whose lots are taken under the power of eminent domain, and paid for according to their exact value. But it is further intimated in this opinion that local taxation for local objects must be extended so as to embrace all the persons and property within a district known and recognized by law as possessing a local sovereignty for local purposes; and whilst it is not shown

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that the constitution of New York contains any such restriction upon the power of taxation, the assumption might be conceded, and yet it would by no means follow that the courts were to determine how limited or how extensive such districts might be. In fact the Kentucky courts, who seemed at one time to have entertained similar views, at last came to the conclusion that the legislature might declare a single square or block or lot to be a district for such purposes. The value of the distinction in this way disappeared, since after all it turned out to be a mere matter of legislative discretion which the judiciary could not supervise or control. It is quite apparent that much of the reasoning of the supreme court, in this case of *The People v. Mayor of Brooklyn, &c.*, is directed against the policy of exercising the right of eminent domain at all, and especially of entrusting its exercise to municipal corporations; and the hardship, inconvenience and injustice resulting from its exercise in individual cases are depicted by the court in vivid colors. But if the legislature have been entrusted with the power and must meet the responsibility of its exercise, such considerations are beyond the control of the courts.

Several decisions in Kentucky have also been referred to which maintain the views advanced by the supreme court of New York, in *The People v. Mayor of Brooklyn*; but as these decisions have been materially modified, if not virtually abandoned, by the same court, in the case of *the City of Lexington v. McQuillan's Heirs*, 9 Dana, 513, it is unnecessary to examine them. The other judges concurring, judgment affirmed.



NORTH MISSOURI RAILROAD COMPANY, Appellant, v. LACKLAND, Respondent.

1. A proceeding instituted in a circuit court in behalf of the North Missouri Railroad Company, under its charter, to obtain a condemnation of land upon which it had located its railroad, is a proceeding in which the court acts in its judicial capacity; an appeal will lie to the Supreme Court from the final judgment of the circuit court in such proceeding.

25	515
384	593
25	515
107	614
25	515
111	242
25	515
113	466
25	515
118	322
25	515
138	596
25	515
168	3 45
25	515
173	1506
176	1565

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2. *Quere:* Whether it would be competent for the legislature, in providing a mode for the condemnation and appropriation of private property to public uses, to make the judgment of a special tribunal final, and thus place the matter beyond the control of the courts.
3. The North Missouri Railroad Company instituted proceedings under its charter to obtain a condemnation of land upon which its railroad was located; *held*, that said company might, at any time before final judgment in such proceeding, change the route of the railroad and dismiss the proceeding.

Appeal from St. Charles Circuit Court.

This was a proceeding instituted by the North Missouri Railroad Company to obtain the condemnation, for the use of said company in the construction of its railroad, of a lot in the city of St. Charles belonging to defendant, Norman Lackland. No petition was filed in the office of the clerk of the circuit court, but an agreement under seal was entered into between the parties, whereby three commissioners or viewers were appointed, to whom the question of compensation was referred, and who were by said agreement authorized to assess the value of the property taken, in like manner and with like effect as if they had been duly appointed under the terms of the charter by the judge of the circuit court, and to make report of their proceedings, upon which action might be taken in the circuit court in like manner and with like effect in all respects as if proceedings had been regularly commenced in the mode prescribed in said charter. This agreement was dated September 12, 1855. On the 24th of September, 1855, the viewers or commissioners filed their report in the clerk's office of the court, awarding to defendant damages in the sum of \$1200. To this report no exceptions were at any time filed by the plaintiff, North Missouri Railroad Company; but on the 23d of October, 1855—being the second day of the term of the circuit court next after the filing of said report—the company, by its counsel, asked in open court a dismissal of the proceedings; which was thereupon ordered. Defendant's counsel was not in court at the time, and no objection was offered to the dismissal. No motion or other action had then been taken in the case since the filing of the report. On the

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30th of October, 1855, being at the same term of court, defendant's counsel moved the court to reinstate the case; which was done—the plaintiff's counsel not being present and no objection being offered. At the same time the defendant moved the court to confirm the report of the viewers or commissioners. The case as it then stood was continued to the May term, 1856, at which term the plaintiff filed a motion to dismiss the cause because its railroad had been removed from defendant's land, and was in process of construction on other land than that of defendant; and further, that the land of defendant was not required and could not be used for any of the corporate purposes of the company, and that the plaintiff could not therefore acquire and hold any title to the same under this proceeding.

It appears from an agreed statement, that, at the time of the appointment of commissioners and of the filing of their report, the location of the North Missouri Railroad was upon the land of defendant; but after the report was filed a resurvey was made by plaintiff, which resulted in locating the road upon another route not upon defendant's land; and thereupon the plaintiff abandoned the route over defendant's land, and directed the discontinuance of all pending proceedings for the condemnation of land on the route which went over defendant's land.

The court overruled this motion to dismiss, and sustained that of defendant to confirm the report of the commissioners, and gave judgment against the plaintiff for the amount assessed by the commissioners, and by its decree vested the title to the land in the plaintiff. The court overruled a motion for a review made in behalf of plaintiff; whereupon plaintiff appealed to this court.

E. A. Lewis and Coalter, for appellant.

I. In proceedings such as the present the relations of the parties are not changed, nor does any new right become vested in either party until the rendition of the judgment. Proceedings of this kind in this country are not as in England in

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the nature of a "compelled contract" of purchase and sale. The various acts of Parliament prescribe the following steps: 1st, the railway company must, in its application for a charter, designate the lands over which the proposed road is to run; 2d, being authorized by the charter to purchase the lands designated, and failing to agree with an owner, the company must give him notice that it requires his land, and offer him a fixed price therefor; if no price be offered with the notice, the latter has no validity; 3d, the owner must respond, stating the particulars of his title, and either accepting the offer, or declining it with a counter proposal; 4th, if thus far the parties do not agree, a jury is empanelled to decide between the respective propositions of the parties; 5th, upon the rendering of the verdict this is registered as a deed of conveyance from the land owner to the corporation. Every step from the first to the last is part of a formal negotiation between seller and purchaser, resulting in a transfer for a *price* and not for "compensation." (See Chambers and Peterson on Railways, 174.) Accordingly, the English courts hold that the relation of vendor and purchaser may exist at various periods anterior to the verdict, and that consequently the rights of the parties will have become vested at such periods. These decisions are all based upon the fundamental theory that Parliament, in its omnipotence, constituting and declaring itself an agent of the land owner, bargains and sells his land to a party competent to bargain and buy. The first move in the negotiation is the charter, which specifically designates certain lands, and on behalf of the owners offers them to the company as a proposed purchaser. In this country, however, the whole theory and system are essentially different. Although, perhaps, not precisely analogous, there is at least the same extent of difference between the two systems that appears between acquisition by voluntary contract and acquisition by confiscation. The proceedings here are based upon an implied constitutional power in the state of "taking" private property for public purposes, provided that compensation be made therefor. No negotiation is implied in any

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of the statutory provisions. No state or federal court in the Union has yet regarded these proceedings as presenting, at any stage, the elements of a contract between the parties. No legislature in the confederacy has power to compel a man to sell and convey his property to a person or corporation as such. The British Parliament may and does do so. Accordingly, it has been found necessary to do in this country, what was never done in England, to-wit, to settle by adjudication that the construction of a railroad is a "public purpose" and within the meaning of the constitution. Thus all the American adjudications, without exception, treat these proceedings upon the following theory : 1st, the legislature has a right to *take* the property of the individual under certain restrictions and to declare how it will exercise that right; 2d, when the mode so asserted by the legislature has been fully acted upon, it is then assumed that the state has "taken" the property; whereupon the owner has a vested right to compensation therefor, whether the state afterwards makes any use of the property or not. Accordingly, in all the New York, New Hampshire, Massachusetts and Missouri cases, where at any stage of the proceedings the right of the public to discontinue was denied, it will be found upon examination that *all the acts* by which the legislature had previously declared it would "take" the property had been consummated. The case in 20 Johns. 269, which may be an apparent exception to this, was afterwards overruled by the same court in the case of *The People v. City of Brooklyn*, 1 Wend. 322. (See *Wilkinson v. Buchanan County*, 12 Mo. 328; *Sess. Acts*, 1839, p. 107; 2 Metc. 558; 4 New Hamp. 517; *St. Francois County v. Peers*, 14 Mo. 537; *St. Francois County v. Marks*, 14 Mo. 539; *Harrington v. Commissioners of Berkshire*, 22 Pick. 563.) But while, in all the above cited cases, every thing prescribed by the legislature for the taking of the property had been done as required, in the present case the distinctive feature is presented, that one of the prescribed steps, and that too which is expressly appointed to inaugurate the new relations of the parties, had not been taken when the right to discontinue was

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asserted. The land owner's right to compensation can not, in any event, vest before that of the public to the land. Wherever any thing has remained to be done under the charter of a railroad company or a statute, and a discontinuance has been asked for, it has not been denied, but granted as a matter of right. In other words, if the law under which the proceedings were instituted required a judgment at their conclusion, then the public had a right to discontinue at any time before that judgment was entered. (See Hudson River R. R. Co. v. Outwater, 3 Sandf. Sup. C. 689; People v. City of Brooklyn, 1 Wend. 332; Canal Street case, 11 Wend. 154; 6 Johns. Ch. 49; Laws of N. Y. 1848, p. 39.) A review of all the adjudications, therefore—as well those in which the right to discontinue was denied as those in which it was admitted—discovers a uniform adherence to the following rules: 1st, the right of the public to discontinue proceedings and abandon the contemplated roadway is unquestionable until rights shall have vested in the parties, whereupon it ceases; 2d, the right of the owner to the ascertained compensation vests whenever the public acquires the right to use the property, and not before; 3d, the right of the public to use the property vests when all the acts pointed out by the special statute—whether that includes a judgment or otherwise—have been consummated, and not before. The recent case of Walther v. Warner, (see ante, p. 277,) has given to these rules a more rigid application, in effect, than that here contended for. The provision of the charter, that upon the filing of the commissioner's award the court "*shall* enter judgment," &c., is merely directory. (Hudson R. R. Co. v. Outwater, 3 Sandf. S. C. 689; see also Sess. Acts, 1855, p. 233, § 3; Underwood v. Lilly, 10 Serg. & Raw. 151; 9 Barb. S. C. 482; 6 Barr. 196; 2 Dougl. 197; 12 Sm. & Marsh. 347; 2 Watts & Serg. 251; 3 Denio, 382; 6 Cranch, 87; Sess. Acts, 1853, p. 133, § 23, p. 144, § 56; Hoffman v. City of St. Louis, 15 Mo. 651.)

II. An appeal will lie to this court from the judgment of the St. Charles circuit court. The proceedings were before

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the court as a court, and in this respect this case may be distinguished from that of The Hannibal & St. Joseph R. R. Co. v. Morton, 20 Mo. 70. The present appeal—being excluded from the practice act of 1849 by article 30, § 6—is governed by the revised code of 1845 (see R. C. 1845, p. 831, § 11), which covers “any final judgment or decision of any circuit court in any civil case.”

C. D. Drake, for respondent.

I. It is necessary to a proper understanding of this case to consider the position of the parties if the charter of the company contained no power to condemn lands for the company's use. That position would be, the land owner on the one side with a title held in full property against all other men, and the company on the other needing the land, but with no power to obtain it without the owner's assent. The only mode by which the company could obtain it would be by purchase, which in law includes every mode of acquiring land by a lawful act of the party. Every purchase necessarily involves, in some form or other, a purchaser acting in the purchase, and a vendor acting in the sale either by a voluntary act or by the efficacy of some proceeding in law *in invitum* held to be equivalent in its effect and results to the voluntary act. If the land owner refuse to assent, it is therefore impossible for the company to acquire the land. At this point the state, in its sovereign capacity and in the exercise of the right of eminent domain—subject to which the owner holds the land—steps in, and declares by enactment that the company, if certain terms be complied with, shall acquire the land. In this the state does not undertake to dispose of its own property, or to invest the company with its own title, but to dispose of, and invest the company with the title of an individual citizen. But this exercise of the right of eminent domain is limited by the constitutional requirement of just compensation to the owner; and the state therefore undertakes that a just compensation shall be paid him, and at the same time compels him to accept that compensation, and in

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consideration thereof to sell his land to the company. Nor does the state in this proceeding speak for and represent itself. Its mere assent to the acquisition of the land by the company would be of no avail to pass the title, for the assent of the owner would still be wanting. When therefore, in the exercise of its paramount authority, the state declares that the company shall have the land—and the company can obtain it only by purchase, and the purchase can not take place without the owner's assent, and the state undertakes to give that assent—the state must be considered as representing the owner, and giving for him and in his name an assent, which, however compulsory on him, is in law regarded as his, which he can not question or repudiate, and the consequences of which he can not avert. The state represents him likewise in protecting his right to a just compensation. While it gives his assent to the sale, and thereby divests him of his property and transfers it to the company, it also demands and compels the payment to him of the compensation; and when this is done, the agency of the state in the matter ceases. In every light therefore the state is the representative of the owner, speaking and acting for him by fundamental right, and without any power in him to gainsay or prevent. Possessing this fundamental right and acting in this representative character, the state declares to the company that it may acquire the land upon the payment of a sum of money to be fixed by three commissioners appointed in a specified mode. This declaration being made in the only way the state could make it—that is, by a written law—there is, so far as the ownership of the land is concerned, an assent or agreement, in the most authoritative form known to our institutions, to sell the land to the company. Whether this be considered as properly and strictly the owner's assent or agreement, as we contend, or as an act of confiscation on the part of the state not involving assent or agreement on his part at all, but directly in opposition to his wishes, and perhaps disregarding and overriding his actual dissent, matters not; for, if only the latter, it is certain that the state does not act for itself but for him, taking his

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land and exacting the compensation for it, paying the compensation to him, and then decreeing the land to the company. The sale following the confiscation—if that be the proper term—is without doubt with the state's assent; which assent—being in relation to the owner's property, and having the effect to securing his right to just compensation, and not for any affair or property of the state—must, in legal contemplation, be regarded in the same light as that of a trustee for his *cestui que trust*, or of a guardian for his ward. Here then is the assent of one party—the vendor—given by the state. What is the next step? Nothing on his part, but some act on the part of the company desiring to own the land. What is that act? Simply the presentation of a petition to a designated tribunal by the company, asking to be invested with the title to the land in the mode prescribed. This is, when reduced to its elementary form, merely an acceptance by the company of the terms on which the state has declared it may purchase the land. When this petition is filed, the other assent—that of the purchaser—is obtained; and at that moment a contract in solemn and authoritative form is entered into—the state, on the one side, speaking through an enactment—the company, on the other, through its petition; the state, on the part of the owner, agreeing to sell—the company agreeing to buy. From the moment that petition is filed the land and its owner are bound. He can not alienate the land so as to avoid the company's right; he can not seriously impair its value without subjecting himself to the restraining action of the judiciary, if the company invoke it. He can not resist the progress of the proceeding to the conclusion authorized by the law. The right which the company acquires by filing the petition is a vested right; vested in the very commencement of the proceeding, and not capable of being divested if the terms of the law be complied with. It exists only in virtue of its agreement to take the land on those terms. The other party to that agreement is the owner, represented by the state, whose assent the state has already given. This right of the company, viewed in its legal aspect,

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is nothing more or less than a right to a specific performance of the state's engagement on behalf of the owner. As this right can not exist, consistently with legal principles, in favor of one party and not in favor of the other, it follows that the owner may equally insist on a specific performance of the company's agreement. Any other view places the owner at the mercy of the company, and renders him liable to interminable vexations; for there is nothing to prevent the presentation of one petition after another, and the dismissing of them, to any extent the company may see fit. The conclusion from the whole argument, therefore, is, that the company had no legal right, after filing the petition, to dismiss the proceeding; and much less after the appointment of the commissioners and the filing of their report and the company's failure to except to it within the time prescribed by the statute, which is equivalent to agreeing to it. This conclusion is in accordance with the tenth section of the charter of the company, which requires that if no valid objection be made to the report within ten days after it is filed "the court *shall* enter judgment," &c. Up to this point the argument has proceeded upon the assumption of an assent by the owner, given by the state for him, and in law regarded as his in effect, whether actually so or not. But this assumption is not indispensable to sustain the position that the filing of the company's petition was a contract on its part to take the land. The law recognizes contracts where the obligor is competent but the obligee is not, and enforces such contracts—as in the case of infants—where they are for the benefit of the obligee. If, in the case in hand, it be held that there was no contract or assent on the part of the owner, still there was a contract on the part of the company in his favor, which the law will, and should, enforce. (*The King v. Commissioners, &c.* 4 Barn. & Adol. 883; *The King v. Hungerford Market Co.* 4 id. 327; *Doo v. L. & C. Railway Co.* 1 Engl. Railway cases, 257; *Stone v. Com. Railway Co.* id. 875; *Tawney v. Lynn & Ely Railway Co.* 4 id. 615; *Walter v. Eastern Counties Railway Co.* 6 Hare, 594; *Burkinshaw v. B. & O. J.*

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Railway Co. 4 Engl. L. & Eq. 489 ; Regina v. B. & O. J. Railway Co. 15 Q. B. 634 ; 4 Eng. Law & Eq. 276 ; Pinchin v. L. & B. Railway Co. 5 De Gex, Macnaughton & Gordon, 851, 864 ; Wilkerson v. Buchanan County, 12 Mo. 328 ; 85 Brit. Stats. at Large, 141, 146.)

II. This proceeding can not be regarded as an action at law or a suit in equity. It is a special statutory proceeding for effecting a particular object in a prescribed mode. The court in the execution of the special powers conferred upon it could do no more than the statute under which it acted authorized. The charter of the company did not authorize the court to dismiss this proceeding on the motion of the company ; it could not therefore legally do it, any more than without statutory authority it could render judgment against the company for the damages assessed or decree the land to the company. (Matter of Beekman street, 20 Johns. 269.)

III. This not being an action at law nor a suit in equity, no appeal lies to this court. The charter of the company gives no right of appeal, and the general law in regard to appeals—the practice act of 1849—does not reach this case. (Hannibal & St. Joseph R. R. Co. v. Morton, 20 Mo. 70.)

IV. The third section of the act of December 12, 1855, (Sess. Acts, 1855, Adj. Sess., p. —,) did not confer the right to dismiss the proceedings. Whatever rights had been previously acquired could not be affected by it.

NAPTON, Judge, delivered the opinion of the court.

This case has been brought here by appeal, and a question has been made whether an appeal lies. The practice act of 1849 (art. 30, § 6) excludes from its operation all special statutory remedies which, before the passage of that act, were not to be obtained by action at law or bill in equity, and would therefore not seem to apply to this cause ; but in the view we are disposed to take of the matter, it is not very material whether that act or the act of 1845 be considered as applicable. The practice act of 1845 (R. C. 1845, p. 831) gives this court a supervision by appeal of all judgments and

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decisions of the circuit court in civil cases which are final. Whatever form the proceedings in the circuit court in a civil case may assume—whether that of an action at law or a bill in equity, or a motion, or some special mode prescribed by statute—if those proceedings result in a judgment of that court, which is final so far as that court is concerned, that judgment may be reversed upon appeal. A *civil* case, I apprehend, is a phrase used merely to exclude criminal proceedings, for which other and special provisions are made.

Nor is it perceived that the act of 1849 is less comprehensive in its scope. If this proceeding is not one “for the enforcement or protection of private rights, or the redress or prevention of private wrongs,” a very restricted meaning must be given to this language, hardly compatible with the general spirit of the law.

That there may be cases where special and limited authority is delegated to a court, not because it is a court, but from some idea of convenience or propriety, and the decision of the court be made final, is not questioned. It may however admit of a doubt whether the legislature could so devise a proceeding designed to effect the transfer of private property to the public, as to deprive the courts of the power of determining whether the constitutional restrictions upon this subject had been honestly complied with. However this may be, the question here is, does the court act in its judicial capacity, and can it exercise, in its control over the subject confided to it by the charter, the general powers and jurisdiction of a court, or is the court, *quoad hoc*, a mere commissioner, a special tribunal selected for a special purpose and *functus officio* when the special powers confided to it by statute have been exhausted?

The act of 1851 (Sess. Acts, 1851, p. 485), incorporating this company, provides for a voluntary relinquishment of the rights of way desired by the company for their road, and also provides a mode by which the company can acquire a right of way, or a title to the land, in cases where the owner is unwilling to relinquish. In the latter case the proceeding is origin-

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ated by an application of the company to the circuit judge of the county where the land lies, whose duty it is made, after seeing that due notice has been given to the land owner, to appoint three citizens of the county to view the land and report the damages. This report, when made, is to be filed in the clerk's office, and "if no valid objection be made to such report, the court shall enter judgment in favor of such owner against such company for the amount of damages assessed, and shall make an order vesting in said company the fee simple title of the land." After some further provisions for setting aside the report on certain contingencies, the act provides that, "in all such cases, the court shall adjudge the costs of the proceeding according to equity; and the court shall have power to make such orders and take such other steps as will promote the ends of justice between the owners of such lands and such company."

There are some provisions in this section which undoubtedly might be construed to limit the power of the judge, as a mere commissioner, to the specific acts delegated; but in the main the general scope of the section looks to the action of the *court* in its judicial capacity, and gives the court authority, not only to pronounce a judgment which will pass a title to the land to the company and a right to the damages to the land owner, but "to make all orders and take any steps" which in the opinion of the court will best promote the ends of justice. Although the act is carelessly drawn and framed in a mode to justify doubts as to its true intent, we will not presume, notwithstanding the absence of any special provisions for an appeal, that it was the intention of the legislature to deprive the parties interested of this right; especially as the provisions of the general law, both of 1849 and 1845, seem large enough, without any strained construction, to embrace the case. We are the more inclined to this opinion, because an appeal is the most convenient and least expensive mode in which the supervising jurisdiction of this court can be exercised, and because it may be safely said that it is at least doubtful whether that jurisdiction could be entirely cut off if

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the legislature had so intended. Could the legislature provide an illusory compensation for private property taken for public use totally at variance with the true spirit of the constitution, and, by placing its enforcement under the control of a selected tribunal and declaring the decisions of that tribunal final, thus place the subject beyond the reach of the courts?

The principal question in this case is, whether the corporation—after the assessment of damages and the report of the viewers, and before the judgment of the court thereon—has a right to discontinue its proceedings; and this question will appear upon examination to be much embarrassed, not only by judicial decisions apparently if not really conflicting, but by the intrinsic difficulties of the subject. Considerations of a forcible and practical character might very well have prompted the legislature to have established the rule either way without its being very obvious that injustice would be done. However, our business does not lead us into this branch of the subject, and we are left simply to inquire what the legislature has declared to be the rule in the act under consideration, and, if no such declaration has been made, what rule the general law of this state has provided.

In England there is no uncertainty as to the rule. It is well settled by the decisions to which we have been referred, that when railway corporations give notice to a land owner on the route of their railway of their intention to take his land, the company is not at liberty afterwards to retract. Indeed the courts have gone to the extent of holding, that, where a party so situated has received such a notice, he may sustain a bill for a specific performance of the agreement implied by the act of Parliament; and the courts will enforce such agreement by ordering the company to take the proceedings prescribed by the statute for ascertaining the amount of purchase money and compensation. (*Walker v. Eastern C. R. Co.* 6 Hare, 593.) An examination of the British Railway Statutes and the judicial constructions upon them will however show that the system in that country essentially differs

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from ours, not only in the principle upon which it is based, but in all the detailed rules by which it is carried out. In England the line of the road is fixed in the charter, and the act is accompanied with a schedule designating all the land through which it passes and its owners or occupiers, so far as their names and the extent of their interests can be ascertained. Contracts for purchase are made before the passage of the act; and those land owners who are upon the proposed line, and are unwilling that their land shall be taken, are heard before Parliament, or its committee who have the subject in charge, and every contested point is adjusted. The act itself effects a sale, the terms of which have been either arranged beforehand or can be ascertained subsequently in the modes pointed out in the law. When the company notifies the dissentient land owner of its intention to take his land, the matter is settled so far as the sale is concerned; and the most exact and careful regulations are made to secure a full indemnity, not only for the value of the land, but compensation for all injuries to portions of land not taken, whether physical and direct or intermediate and consequential. This matter is, in certain cases, submitted to a justice of the peace—in others, to arbitration—and in others again, to a jury selected by the sheriff. In no case is there any appeal; much less can the company withdraw their propositions. It is considered as a forced purchase under the authority of Parliament, and the notice concludes the contract. In addition to this, the company must be prepared to show that their stock has been paid in before they can touch the land.

In this state the course pursued is so totally different, both in system and in all its details, as hardly to require that the points of difference should be particularly enumerated. Railway charters are to be had for the asking, without money and without a route. They are frequently granted ten years before the undertakers are compelled to take the first step either in making a survey or raising any portion of the capital. No line of the route is determined by the charter; for, though a starting point is usually designated, and sometimes

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a terminus is also fixed, the line between these points, perhaps hundreds of miles apart, is left to be determined by the interest, convenience or fancy of the company. The counties through which the road is to pass are not even determined, much less the particular tracts of land. The charter of the North Missouri Railroad authorizes the company to build a road from "St. Charles passing up the divide between the tributaries of the Mississippi and Missouri rivers, as near as may be, to the northern boundary line of this state." Here is a scope, varying probably from ten to two hundred miles, within which this company are at liberty to locate their road. Railroads are constructed here, not so much with a view to furnish facilities to existing wealth and population and commerce, as to create them in a wilderness. Hence the subject of damages has not been esteemed one likely to be very important, and has been disposed of in a summary way in a single section—a subject which in England occupies nearly two hundred pages of the statutes and has furnished material for volumes of comments. (85 British Stats. at Large, 141; Chambers and Peterson on Railways.)

It is not easy to determine, from the act which incorporates this North Missouri Railroad Company, at what period the route can be said to be so located as to deprive the company of the power to change. The act gives to the company an indefinite power to "survey, mark, locate and construct" a railroad from St. Charles to Iowa. The act is entirely silent as to how many routes may be surveyed—what shall be considered as binding the company to any particular route—how long they shall be so bound—and how often they may change their selection. It would seem that the power to change a location once determined on is by no means expressly denied, but on the contrary is rather impliedly given. If the company begin at St. Charles and end on the Iowa line, there is no intermediate point determined, except that they are restricted in their selection of a route to that district of country which is denominated "the divide" between the waters of the Missouri and Mississippi rivers; and what acts shall constitute

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a location are not specified. By reference to the twenty-third section of the act of 1853 (Sess. Acts, p. 133) it will be seen that the power to change the route is expressly given to the company. The only restriction upon this right contained in that provision is, that where the alteration is proposed in a city or town, it can not be done after the construction of one road unless with the consent of the corporate authorities; and in all cases where an alteration is made after grading has been done on the route first selected, compensation must be made for the injury done to the lands graded. The 56th section of this act declares that "all existing railroad corporations in this state, and such as now are or may be hereafter chartered," shall have all the power and privileges given by the act; and the 23d section is particularly referred to as applicable to all existing corporations, unless their charters contained provisions inconsistent therewith. There is nothing in the 23d section of the act of 1853 at all inconsistent with any provisions of the charter of the North Missouri Railroad Company; on the contrary, as the section is manifestly for the benefit of the company, it may be presumed to have been accepted by the company, and it would seem from this section that until some work is done on a proposed route the company have absolute power to abandon it at their pleasure. What effect such abandonment may have on the rights of others is not provided for or alluded to in the section.

In addition to these obvious marks of distinction between the system of railway enterprises in England and in this country, it may be observed that the principles upon which a transfer of lands from individuals to corporations is effected under the two systems are quite distinct. In England the power of Parliament is exerted to effect a sale, which may be voluntary or involuntary on the part of the vendor, but to which the assent of the vendee is implied by the passage of the charter; and the first step taken by the corporation in pursuance of its charter, to indicate to the vendor that his land will be required, is regarded as completing the contract.

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Here there is nothing having the appearance of negotiation and sale ; but the state transfers its powers of eminent domain to the corporation, and authorizes it to take the land desired upon paying the compensation to which the land owner is entitled, and a provision is made to ascertain this compensation. At what period of time the right to the compensation becomes vested and the title to the land is transferred must depend upon a fair construction of the statutory regulations which control the subject here, and but little argument is to be derived from the acts of the British Parliament, or the established practice under them, which, although directed to a common object with ours, are yet based upon different systems and different principles, and controlled by a very different set of circumstances.

In New York the later and more prevalent opinion seems to be, that the company does not acquire any vested or indefeasible right or title to the land sought to be taken, nor the owner any right to the compensation ascertained by the commissioners, until their report is filed and confirmed, and the order of the court made for the payment of the amount. (*Hudson River Railroad v. Outwater*, 3 Sand. S. C. 691 ; *The People v. Brooklyn*, 1 Wend. 322 ; *In the matter of Canal street*, 11 Wend. 154.)

The decisive question in the case is, at what time do the rights of the parties become vested ? Under the charter of the North Missouri Railroad Company, do the rights of the parties become vested upon a notice from the company to the land owner, or upon the appointment of commissioners to view the land, or upon the report of the commissioners, or upon the judgment of the circuit court confirming the previous proceedings in the case ? The language of the act is that " the court shall enter judgment in favor of such owner against such company for the amount of damages assessed, and shall make an order vesting in said company the fee simple title of the land." The court is not authorized to enter a judgment for the compensation against the company until all the preliminary steps pointed out in the act have been

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taken ; until after a notice has been given to the land owner, commissioners appointed by the judge, a report made by the commissioners, and the report confirmed. Undoubtedly, if the compensation vested upon any of the preliminary stages of this proceeding, the title to the land for which compensation accrues must have at the same period passed to the company ; yet by the terms of the act the court is not warranted in making any order vesting in the corporation the fee simple title to the land until all the previous steps pointed out in the act have been taken. There is undoubtedly much force in the argument against this construction, based upon the impolicy of permitting these corporations arbitrarily to shift their position, upon the faith of whose stability the individual land owner may have subjected himself to great inconvenience, and other citizens may have invested their means upon the supposed line of the road. We are fully impressed with the weight of these considerations, but on the other hand the legislature seem to have disregarded them by giving to the company the undoubted right of changing their route up to the very period of commencing their work, and even beyond that, upon certain contingencies referred to in the statute. The legislature may have thought that the public, and the corporation chartered to promote the public interest, would sustain a larger amount of injury by being compelled to abide by its first location in cases where the damages assessed would be esteemed exorbitant and onerous, than individuals would suffer by permitting the corporation in such cases to change the route rather than pay the damages. At all events we think the fair construction of the charter is, that until the judgment of the court the company has a right to discontinue its proceedings.

The cases in Massachusetts and some adjudications in this court, to which reference has been made, relate to the construction of county or state roads ; and there is nothing in those opinions, so far as we have observed, conflicting with the conclusion reached in this case.

In these cases concerning a condemnation of land, the act

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provides that the court shall adjudge the costs of the proceeding according to equity. It is obvious that if the company is permitted to discontinue, all the costs and expenses of the land owner should be paid by the company. This will embrace all the costs of the case and counsel fees, both here and in the court where the case was tried.

The other judges concurring, the judgment is reversed and and the cause remanded.

THE NORTH MISSOURI RAILROAD COMPANY, Appellant, v. REYNAL, Respondent.

1. North Missouri Railroad Co. v. Lackland, (*ante*, p. 515,) affirmed.
2. Where a railroad company, after having commenced proceedings for the condemnation of land upon which its railroad is located, exercises its right of dismissing the proceedings before the judgment of the court upon the report of the viewers or commissioners is rendered, the company should pay the costs and expenses growing out of the suit.

Appeal from St. Charles Circuit Court.

E. A. Lewis and Coalter, for appellant.

C. D. Drake, for respondent.

NAPTON, Judge, delivered the opinion of the court.

This case is in all respects like the case of the same company against Lackland, except that the appellant here—after notification that his lot in St. Charles was wanted by the company, and after it had been assessed by commissioners—abandoned his business, which was that of a carpenter, and removed to a farm in the country, selling off the tools of his trade before removal. As the company had a right to discontinue their proceedings previous to the judgment of the court upon the assessment, the inconvenience and pecuniary loss attending the appellant's course is not chargeable to the company, but they will be made to pay the costs and expen-

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ses growing out of the suit, as in the case heretofore decided. The other judges concurring, the judgment is reversed, and the cause remanded.

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**LOUISIANA & FRANKFORD PLANK ROAD Co., Respondent, v.
PICKETT, Appellant.**

1. The eighth section of the "act to authorize the formation of associations to construct plank roads and macadamized roads," approved February 27, 1851, (Sess. Acts, 1851, p. 259,) is in conformity to the constitution in so far as it authorizes the jury, appointed to assess the damages received by the land owner, to take into consideration the "advantages of said road to said owner."
2. The "advantages" which may be taken into consideration in determining the "just compensation" to which the land owner is entitled, are the direct and peculiar benefits or advantages accruing to him in particular in respect of the residue of his land unappropriated, and not any general benefit or increase of value received by such land in common with other lands in the neighborhood.
3. The provision contained in the eighth section of the "act to authorize the formation of associations to construct plank roads and macadamized roads, (Sess. Acts, 1851, p. 259,) authorizing the appointment of a "jury of five disinterested land owners of the county to assess the damages," &c., is in conformity with the constitution; they do not perform the proper and usual functions of a jury in civil or criminal cases.

Appeal from Pike Circuit Court.

The facts sufficiently appear in the opinion of the court.

E. Hunt, for appellant.

I. The "just compensation" to which the defendant was entitled was the value of the land taken without regard to any supposed advantages of the road to the defendant. (Constitution, art. 13, § 7.)

II. This value should be assessed by a jury of twelve men.

III. The proceedings are also erroneous and void because they do not show what quantity of land has been taken for the road; how wide a strip or how long; or where it enters or leaves the quarter section; nor is there any description separating it from the land not taken for the road.

25	535
120	122
25	535
128	80
198	291
25	535
180a	178

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A. H. Buckner, for respondent.

I. No exceptions were taken to the direction of the court to the jury as to the mode of assessment ; nor was the objection made before the jury.

II. The road had been surveyed and located, and the petition states the quarter section through which the road is located ; so that if the award of the jury does not specify the particulars, they can be made perfectly certain. "That is certain which can be made certain." (4 Whart. 47.)

III. The act is constitutional so far as it authorizes the advantages to be set off against the injury sustained. (8 Barr. 445 ; 13 Barb. 169 ; Whitman v. Wilmington R. R. Co. 2 Harring. 514.) Damages may be assessed in any fair and equitable way without a jury. (Gardner v. Newburg, 2 Johns. Ch. 162 , Jackson v. Winn, 4 Litt. 323 ; 2 Mass. 489 ; 4 Whart. 47.)

NAPTON, Judge, delivered the opinion of the court.

The application of the Plank Road Company to the justice, in this case, stated that the road, as surveyed and located by their engineer and adopted by their board of directors, ran over the defendant's land, and the quarter section occupied and owned by the defendant is particularly described ; but the exact route of the road is not specified any further than by reference to the survey of the engineer, which was not made a part of the petition nor filed with the papers.

In the circuit court, to which the case ultimately went by appeal, a jury of five men was ordered, and it was agreed that their sealed verdict should be filed in vacation and a judgment entered thereon by the court. At the first term of the court after the verdict was rendered, a motion was made to set aside the proceedings and dismiss the case, 1st, because the 8th section of the act of February 27, 1851, entitled "An act to authorize the formation of corporations to construct plank roads and macadamized roads," was unconstitutional ; 2d, because a jury of five men instead of twelve were ap-

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pointed ; 3d, because the jury were directed to allow advantages to set off the value of the land ; 4th, because the application to the justice was not specific enough in relation to the exact position and quantity of the land desired to be condemned.

Upon this motion all the proceedings before the justice, and the appointment of a jury or commissioners by the circuit court, and the instructions of the court to the commissioners, were submitted to the court, and the motion overruled and bill of exceptions taken. The instructions thus referred to in the bill of exceptions are as follows : "The jury shall go upon the land over which the road is proposed to run, and shall assess the damages sustained by said Pickett, taking into consideration the advantages, if any, which said road may be to said Pickett, and the jury shall make out in writing their verdict and all shall sign it, and it shall be sealed and delivered to the clerk by one of the jurors."

The point in relation to the constitutionality of the law in question has been already considered and decided by this court in the case of *Newby v. Platte County*, ante, p. 258. The instruction given by the court was erroneous in not restricting the jury to such direct and peculiar benefits or increase of value as were occasioned to that part of Pickett's land not taken for the road, and directing them to discard from their consideration any general benefit or increase of value received by such land in common with other lands in the neighborhood. This has been determined to be the proper construction of this and similar statutes. (See *Newby v. Platte County*, ante, p. 258 ; *Pacific Railroad v. Chrystal*, post, p. —.)

The appointment of five instead of twelve men to assess the damages is not, in our opinion, inconsistent with the constitution. That provision in the state constitution which declares that the right of trial by jury shall remain inviolate is not applicable to cases of this character. The persons appointed to assess the damages in cases of this kind do not perform the proper and usual functions of a jury in civil or

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criminal trials. They might with more propriety be termed commissioners, and their number is a matter of discretion with the legislature. (*Livingston v. The Mayor of New York*, 8 Wend. 100.)

The application to the justice should have stated with more certainty the particular land desired ; but as the line of the road was surveyed, and a reference made to the survey in the application, we should not for this cause alone think it necessary to reverse the judgment. The motion to dismiss was properly overruled ; but the court should have appointed another commissioner with proper instructions.

The other judges concurring, the judgment is reversed, and the cause remanded.

RICHARDSON, Judge. I concur in the reversal of this judgment because it does not appear, from any part of the record, what portion of the defendant's land the plaintiff proposed to take and occupy for its road. The survey is not made a part of the petition, and is not referred to in the judgment ; and, as it does not appear where it is filed, it can not connect itself with the proceedings so as to identify the land sought to be taken. The commissioners may have estimated the damages in reference to a particular location of the road through the defendant's land, and reported no injury ; whereas, if afterwards the plaintiff should adopt a different route than that examined by the commissioners, the defendant might suffer great loss, which he could not avert by the judgment of condemnation ; for it fails to show the line of the road in reference to which the estimate was made.

But I am not satisfied with the rule which the majority of the court have laid down in reference to the computation of benefits to be set off against the damages for the right of way. I do not think the point is decided in *Newby v. Platte County*. (See *ante*, p. 258.) The learned judge who delivered the opinion in that case mentions the rule adopted in Massachusetts, and suggests that the legislature seems to have recognized the principle in the St. Louis charter ; but he

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does not give his own opinion, and the question was left open. I have always supposed that the constitutional provision, that "no private property ought to be taken or applied to public use without just compensation," only meant that the person whose property is taken for a public work should be indemnified against loss, and that it was only intended to secure redress for any damage that might result from the exercise of the right of eminent domain. Compensation is an equivalent for property taken or for an injury done to another ; and the spirit of the term "just compensation" is preserved when the person whose property is taken is made whole. If the owner is benefited more than he is injured, it can not be said that he has sustained a loss or that he has not received a "just compensation." The constitution does not determine how the equivalent shall be made ; but it seems to me that it does not contemplate the payment of damages to an owner for the privilege of running a road through his land, when the enhanced value given to the land is greater than any injury it sustains ; and any appreciable advantage accruing to the property ought to be taken into the account in appraising the damage.

If a railroad is made through a tract of land of one thousand acres, worth five dollars per acre, situated in a large prairie remote from fuel, timber or market, and ten acres of the land, worth fifty dollars, are taken for the road, but the direct and certain consequence of the location of the road is to enhance the value of the whole tract ten dollars per acre, it could hardly be said that the owner was damaged, or that he should be paid a premium for having a market and other conveniences brought to his door. And though his neighbor, whose lands are not touched, may also be benefited by the construction of the road, his gain is none the less, and he can not complain that the enhancement is not local and peculiar to him alone. The material question is whether the property, in reference to the value of the whole tract, is benefited or injured.

This view of the subject is maintained with much ability

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by the courts of several of our sister states. (Greenville & Columbia R. R. Co. v. Porltow, 5 Rich. 428; 8 Penn. 441; Alton & Sang. R. R. Co. v. Carpenter, 14 Ill. 190; Pierce on Am. R. R. Law, 206.)

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NORTH MISSOURI RAILROAD COMPANY, Defendant in Error, v.
GOTT, Plaintiff in Error.

1. In a petition in behalf of the North Missouri Railroad Company for the condemnation of the land upon which its railroad was located, it was alleged that the road passed hills and valleys, and that a strip of one hundred and fifty feet in width was necessary for the construction of the road; *held*, that this allegation was not traversable.
2. In a proceeding, instituted in behalf of the North Missouri Railroad Company to condemn land, *three* commissioners or viewers were, in accordance with prayer of the petition, appointed to assess the damages; *held*—it not appearing that said company had accepted the provisions of the general railroad law of February 24, 1853, (Sess. Acts, 1853, p. 128,) requiring the appointment of *five* commissioners, &c.—that the proceeding was properly conducted under the act of incorporation of March 3, 1851. (Sess. Acts, 1851, p. 483.)

Error to Montgomery Circuit Court.

The commissioners appointed by the court to “assess the damages” sustained, adopted the following rules: “1. The commissioners should assess and give damages for the land taken for the road at its market value at the time taken. 2. They should take into their consideration the enhanced value of the whole tract of land, through which the road runs, in consequence of the road, and also the injury the road is to the whole tract by separating its parts or otherwise, and offset the one against the other, and give to the owner by way of damages any excess of injury over such advantages.”

The commissioners assessed the “compensation” of defendant at \$287.40.

Hunt and Broadhead, for plaintiff in error.

I. The court ought to have called for evidence to sustain the issue, whether there were hills and valleys on the sur-

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veyed route rendering one hundred and fifty feet necessary to construct the road. (General Railroad Law, Sess. Acts, 1853, p. 121, § 15.).

II. *Five* commissioners should have been appointed instead of *three*. (Sess. Acts, 1853, p. 121, § 15.)

III. The petition asks for an absolute title, and the court by its decree granted it, whereas the general railroad law only gives the *use* of the condemned land to the company.

IV. On refusing to set aside and dismiss the whole proceedings the court ought to have appointed a new board of commissioners. They adopted a wrong rule in assessing the damages. They ought not to have taken into consideration the enhanced value of the land which was common to all the adjacent lands, and offset this increase of value and general benefit against the special and local damage sustained by the defendant by having his land divided into small and valueless parts. The commissioners can only offset local and special benefits against local and special injuries. (13 Barb. 169; 16 Barb. 6, 100, 273; 17 Wend. 649.)

E. A. Lewis, for defendant in error.

I. The motion to set aside the report and appoint a new board of commissioners was properly overruled. The commissioners did not exceed their authority in assessing damages upon one hundred and fifty feet width; for that was what they were expressly appointed and required to do by competent authority. It was not within their province to decide whether one hundred and fifty feet or less would meet the necessities of the company, but only to assess damages for the land described in the petition. (Sess. Acts, 1851, p. 485, § 9.) The affidavits of Magee and Lee show that there were "hills and valleys" within the contemplation of the charter. (Sess. Acts, 1851, p. 485, § 7.) The question of the insufficiency of the damages can not be reviewed in this court upon the record presented.

II. The motion to dismiss the proceedings was properly overruled. The proceedings were properly instituted under

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the charter of the company and not under the general railroad law. The provisions of the latter have exclusive application to companies organized under that act alone. The asking for a fee simple title is in conformity with the charter, (Sess. Acts, 1851, p. 485, § 10,) and the provision granting the same is not unconstitutional. (21 Mo. 294; 3 Whart. 555; Walther v. Warner, ante, p. 277.) But even were it unconstitutional, that would not support this motion to dismiss, but would go to modify the form of the final judgment only.

III. The rule for estimating the damages was correctly laid down, or was at least such as the defendant could not complain of. (Sess. Acts, 1851, p. 485, § 9; Sess. Acts, 1853, p. 130, § 16; Newby v. Platte County, ante, p. 258; 14 Penn. 245; 4 Whart. 47; 8 Penn. 445; 4 Cush. 291.)

RICHARDSON, Judge, delivered the opinion of the court.

The objections of the appellant to the proceedings of the circuit court, and relied on here for the reversal of the judgment, are, 1st. That the defendant was denied the right of trying the issue made on the statement in the petition, that the road passed hills and valleys, and for that reason the width of one hundred and fifty feet was necessary; 2d. That the commissioners to assess the damages ought to have been appointed pursuant to the provisions of the general railroad law of 1853; 3d. That an improper rule was adopted by the commissioners in assessing the damages. The other points are embraced in the second objection.

This company was incorporated March 3d, 1851, (Sess. Acts, 1851, p. 483,) and the 7th, 8th, 9th and 10th sections of their charter prescribe their powers and duties and the mode of procedure for acquiring the right of way. The seventh section gave them the right to hold a strip of land the whole length of the road not exceeding one hundred feet in width, "provided that in passing hills or valleys the said company are authorized to extend said width in order to effect said object." The reason of this provision is manifest,

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for greater width is necessary where the unevenness of the surface requires deep excavations or heavy embankments; and as the land condemned for the right of way is of no value to the company but for the bed of their road, this power is not liable to be abused, and is restrained by the consideration that the assessment of damages is influenced by the width of the land taken. The petition averred that the road through the defendant's land passed hills and valleys, and that the width of one hundred and fifty feet was necessary for the construction of the road. The statement was no doubt made on the report of the engineer, whose judgment in that matter controlled the plaintiff, and the allegation was not traversable by the defendant.

The 9th section provides, that if the owner of land over which the road passes refuses to relinquish the right of way, upon proper petition to the judge of the circuit court, it shall be his duty to appoint *three* disinterested citizens of the county to view the land and assess the damages. All the details of the proceeding are furnished, and no further legislation was necessary for this company on that subject. The 14th and 15th sections of the act entitled "An act to authorize the formation of railroad associations and to regulate the same," approved February 24th, 1853, (Sess. Acts, 1853, p. 121,) prescribe the mode to be pursued for condemning land for railroads, which differs in many respects from the proceeding directed in the plaintiff's charter. They require the petition to contain elements and averments essentially variant from the requirements of this charter, and direct the court or judge to appoint *five* commissioners for the assessment of damages, four of whom are to be selected from a list of twelve names to be submitted by the parties. The 56th section declares that all railroad corporations then existing, or which might thereafter be chartered, should respectively possess the powers contained in that act, and should be subject to all the duties, liabilities and provisions, not inconsistent with their charters, contained in certain enumerated sections, including sections fourteen and fifteen. The mode of assess-

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ing damages in the plaintiff's charter is inconsistent with the 14th and 15th sections of the general railroad law; and, by the express declaration of the act, it does not operate to modify or repeal provisions in the charters of corporations inconsistent with it. It does not appear that this company has adopted the provisions of the act of 1853, and this proceeding was therefore properly conducted under the act of incorporation.

It is not necessary to decide whether the rule adopted by the commissioners for the assessment of damages was correct, for it is sufficient to say that it was more favorable to the defendant than the rule laid down by this court in *Newby v. Platte County*, (ante, p. 258,) and he can not complain. The judgment will be affirmed.

PACIFIC RAILROAD, Defendant in Error, v. CHRYSAL, Plaintiff in Error.*

- [Table of Contents]*
1. The benefits that may be charged, under section 9 of the act incorporating the Pacific Railroad (Sess. Acts, 1849, p. 219), against land owners adjacent to said road—portions of whose lands may be taken and appropriated to public use—and deducted from the value of the land taken, in estimating the “just compensation” to which such land owners are entitled, are the direct and peculiar benefits resulting to them in particular, and not the general benefits or advantages they, in common with other land owners in the vicinity, derive from the use to which the portions taken are appropriated.
 2. The “value”—in the sense of the ninth section of said act—of the land taken is its value independent of the location of the railroad; and the “disadvantages,” that may be taken into consideration, are the injuries resulting to the land owner, in respect of the residue of the tract unappropriated, from the particular mode in which part thereof is taken, or the use to which it is applied.

Error to Franklin Circuit Court.

Delafield, for plaintiff in error.

I. The right of eminent domain can not be granted to a private person or corporation for private uses. (2 Kent,

* *RICHARDSON*, Judge, having been of counsel, did not sit at the hearing of this cause.

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Com. 339, note and cases cited; 2 Dall. 304.) A railroad company whose road is nowhere by the law declared to be a *public road* is nothing more than a *private* person in the law. (Harding v. Goodlett, 3 Yerg. 41; Gardner v. Trustees of Newburg, 2 Johns. Ch. 161.) Nowhere do we find in the acts of incorporation, whether original or amended, any declaration of law that the Pacific Railroad is a public road for public uses. It clearly does not come under the general road laws of the state. It is only a private corporation.

II. By the constitution of the United States no freeman can "be deprived of life, liberty or *property* without due process of law." This means, by the law of the land and by a jury of twelve men. (2 Kent, Com. 13; 2 Coke, Inst. 50; 19 Wend. 659; 4 Dev. 15; 10 Yerg. 71; 2 Yerg. 554.)

III. Private property can not be taken for public use without just compensation. Prospective benefit is no compensation. No compensation whatever was adjudged to defendant.

S. T. & A. D. Glover, for defendant in error.

I. No exceptions were saved to the decisions of the court below. The only exception taken was to the refusal of the court to appoint new commissioners after the report had been confirmed.

II. A writ of error will not lie in this case. (Hannibal & St. Joseph R. R. Co. v. Morton, 20 Mo. 70.)

III. The constitutional guaranty that secures the right of trial by jury is not violated by the provision in the charter for the appointment of commissioners to assess the damages. (Beckman v. Saratoga, R. R. Co. 3 Paige, 45; 19 Verm. 478; 5 Verm. 186; 11 N. H. 19.)

IV. Railroads are public improvements from which benefits result to the public; and the right of eminent domain may be exercised either directly by the agency of the government or through the medium of corporate bodies. (3 Paige, 45; Bloodgood v. Mohawk R. R. 14 Wend. 51.)

V. The provision of the charter authorizing the commissioners to consider the advantages arising to the owner of the

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land sought to be condemned is constitutional. (*Meacham v. Fitchburgh R. R. Co.* 4 *Cush.* 291; 8 *Cush.* 600; 5 *Blackf.* 384; 8 *Wend.* 100; 17 *Wend.* 669; *People v. Mayor of Brooklyn,* 4 *Comst.* 419; 6 *Barb.* 209; 16 *Barb.* 69; 17 *Wend.* 669.)

NAPTON, Judge, delivered the opinion of the court.

Most of the points made and discussed-in this case have been decided by the court in other cases during this term, and it will not therefore be necessary that they be particularly noticed.

The order of the circuit court to the commissioners appointed to assess the damages to Chrystal's land was, "that said commissioners, in forming their estimate, make due allowance or deduction for *any* advantages or benefits which the said William Chrystal will derive from the said Pacific Railroad, but not allowing him the benefit of any rise in land in consequence of the survey."

Although no exception was taken to this order, or the instructions contained therein, at the time it was made, yet, inasmuch as the order may be considered as the chart by which the commissioners were guided, the motion of the defendant to set aside the assessment or report and appoint new commissioners may be regarded somewhat in the light of a motion in arrest, and as sufficient to authorize this court to review the action of the circuit court.

In the case of *Newby v. Platte County*, (ante, p. 258,) this court held that "the benefits to be charged the land owners whose lands are taken for a railroad, and deducted from the compensation to be allowed for the value of the land taken and the injury resulting to other adjoining land, must be the *direct and peculiar* benefits which result to them in particular, and not the *general* benefits they derive in common with other land owners in the vicinity from the building of the road."

The value of the land taken means its actual value independent of the location of the road. The disadvantages

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spoken of by the act are the injuries arising from the taking of only a part of a tract, which, from a variety of causes, may more or less impair the value of the part left, or entirely destroy its value.

It is manifest that the order of the court to the commissioners did not conform to these principles. The report should therefore have been set aside and a second assessment made with proper instructions. Judge Scott concurring, the judgment is reversed and the cause remanded; Judge Richardson not sitting.

HANNIBAL, RALLS COUNTY & PARIS PLANK ROAD CO., Defendant in Error, v. MENEFEE, Plaintiff in Error.

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123 119

1. The fact that the directors of an incorporated company may have violated the provisions of the charter of the company will not release a subscriber to the stock of the company from his liability to pay calls made upon his subscription of stock.

Error to Ralls Circuit Court.

The facts sufficiently appear in the opinion of the court.

Lipscomb and Anderson, for plaintiff in error.

I. The answer of Menefee was a good defence, and should not have been struck out.

Richmond, for defendant in error.

RICHARDSON, Judge, delivered the opinion of the court.

This corporation was organized under the act "to authorize the formation of associations to construct plank roads and macadamized roads," approved February 27, 1851. (Sess. Acts, 1851, p. 259.) The original articles of association were signed by the defendant, who subscribed for eight shares to the stock of the company, and, after a part of the road had been made, he was required by the directors to pay instal-

Hannibal, Ralls County & Paris Plank Road Co. v. Menefee.

ments on his stock, which he refused to do ; and this suit was brought to recover the calls that were due. The only defence set up in the answer is, that the directors had violated the charter of the company, which required the construction of a plank road, by causing three miles of the road to be made of gravel ; and for that unlawful act of the directors the defendant insisted, as a matter of law, that he was discharged from his obligation to pay his subscription. The answer on motion was stricken out and judgment rendered for the plaintiff. The only question in this case for our consideration is, whether a stockholder is discharged from the payment of his subscription because the directors of a company may violate its charter. The principle involved here is clear of the question, how far a stockholder may be affected in his obligations or relations to the company by a material change in its charter made without his consent ; for it is not pretended that any alteration was made in the charter by any authority competent to change it, but only that the directors abused their trust.

The directors are merely agents of the corporation. They do not own the stock subscribed, and can not sue for it ; and therefore a defence that might be made to a suit, brought in their names and for their personal benefit, would not be responsive to an action in the name of the corporation. This suit is in the corporate name of the company that represents all the stockholders, each one of whom is interested in the proper administration of the assets of the company ; and the suit is practically for their benefit. The real question is, whether a stockholder is discharged from the payment of his subscription and from his duty to bear the part he has assumed of a common burden with other stockholders, because his and their agents in some particular may transcend their authority.

If the directors contract a debt beyond the scope of their power, which they pay, and then call upon a stockholder to contribute his part to reimburse them—if it was simply a controversy between the principal and his agents—contribution

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would be denied. But the directors have no power to change the charter of a company, and if they violate it, their unlawful act will not release a stockholder from the payment of his stock ; for if it releases one it would release all ; and if all were discharged, the corporation would be virtually dissolved, and its just creditors would receive nothing, though their debts were contracted in good faith and for the immediate benefit of the company. The defendant only complains that three miles of the road were made of gravel, and we must suppose that the remainder of it was constructed of plank and strictly in conformity to the articles of association ; but if the defence is valid, it would be equally so if only the third of a mile was made of gravel ; and in that case what would become of the obligation of the company to pay for that part properly made ? The laborers and others who assisted to make it would look, not to the directors individually for payment, but to the company, and the company would necessarily rely, for the means to pay with, on the stock subscribed ; but this would be a poor dependence if every stockholder could refuse to pay because his agents had in some other particular abused their trust.

The recognition of the principle asserted in the answer would tolerate repudiation by a corporation of its honest debts in every case where it relies for means on the collection of its stock subscriptions, and the stockholders could discover that the directors in any manner had violated their charter. If it is a good defence that the directors violated the charter, any other unlawful act would justify a like refusal to pay ; and creditors of a corporation, who advance money or perform labor on the faith of the capital stock subscribed, would be the sufferers by the improper conduct of directors, rather than those who clothe them with authority and authorize them to contract for the corporation.

The motion to strike out the answer was properly sustained, and the judgment will be affirmed with the concurrence of the other judges.

Lindell v. Hannibal & St. Joseph Railroad Co.

LINDELL, Plaintiff in Error, v. HANNIBAL & ST. JOSEPH RAILROAD CO., Defendant in Error.

1. The Hannibal and St. Joseph Railroad Company entered—under the second section of the “act to amend an act entitled ‘an act to incorporate the Hannibal and St. Joseph Railroad Company,’” approved February 28, 1858, (Sess. Acts, 1858, p. 321,)—upon the land of plaintiff and cut timber for the construction of their railroad; *held*, that the plaintiff was not entitled to treble damages under the “act to prevent certain trespasses.” (R. C. 1845, p. 1088.)

Error to Marion Circuit Court.

This was an action against the Hannibal and St. Joseph Railroad Company to recover the value of timber cut and carried away from the land of the plaintiff, Peter Lindell. The jury found a verdict for the plaintiff, and found the value of the timber taken by the defendant from the land of the plaintiff to be \$1554.35. The plaintiff moved the court for judgment for treble the value of the timber as found by the jury. The court overruled the motion and gave judgment for single damages only.

Lipscomb and E. Bates, for plaintiff in error.

I. The declaration is sufficient under the first section of the “Act to prevent certain trespasses.” (R. C. 1845, p. 1071; *Ewing v. Seaton*, 17 Mo. 465.) The company in their pleading do not claim to own the land or the timber taken therefrom; nor do they pretend to have had a probable cause to believe the timber taken was their own. They claim only “that they had probable cause to believe they had a right by law to enter upon the land and remove the timber.” Between a supposed right to take another’s property and the ownership there is a vast difference. The fourth section of the above cited act concerning trespasses has reference to ownership and not to a supposed right to take. Nothing will extenuate the trespass but the belief that the land or the timber taken therefrom was defendant’s own. (*Emerson v. Beavaus*, 12 Mo. 511.)

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II. The second section of the act of February 23, 1853, (Sess. Acts, 1853, p. 821,) is unconstitutional and void. (Const. of Mo., art. 13, § 7; Bloodgood v. M. & H. R. R. Co. 18 Wend. —.)

Anderson, for defendant in error.

NAPTON, Judge, delivered the opinion of the court.

In this case the court refused to treble the damages found by the jury, for the following reason: "It appears from the record evidence that the entry was made under the second section of an act entitled 'An act to amend an act entitled 'An act to incorporate the Hannibal and St. Joseph Railroad Company,'' approved February 23, 1853; it further appears from the evidence that the company, after they commenced cutting the timber, applied to H. W. Hollingsworth, a justice of the peace for Marion county, who upon said application appointed three disinterested freeholders of the county to assess plaintiff's damages, and that said householders, after having been sworn by said justice, did upon their own view—made after the timber had been cut and a portion of it removed—assess the plaintiff's damages at eleven hundred dollars, and made out their report in writing, which was produced on the trial; and the court is of opinion that, under the above state of facts, the defendant had probable cause to believe that the timber taken was its own, and that under the fourth section of the act entitled 'An act to prevent certain trespasses,' approved February 10, 1845, the plaintiff is entitled to single damages only."

This construction of the fourth section of the act of 1845 concerning trespasses is, we think, correct. To hold otherwise would be to attribute to the legislature the gross inconsistency of declaring on one page of the statute book that this company could go upon the plaintiff's land and take the timber wanted for the construction of their road, and on the next page declaring that this authority, thus solemnly given, should not even furnish the company with a *decent excuse* for doing

Lindell v. Hannibal & St. Joseph Railroad Co.

the very thing the legislature have permitted. If this is not a case in which there was probable cause to believe that the defendant had a right to make use of the timber of the plaintiff, it is not easy to conjecture what cases would come within the meaning of the fourth section of the act concerning trespasses referred to. It will always turn out, whenever an action of trespass is sustained, that the defendant was mistaken in thinking, if he did so think, that the land or the timber was his own ; and if his opinion be held immaterial in fixing the amount of damages, it must follow that in all cases they must be trebled. And if an opinion, based upon a plain provision in a legislative act clearly giving him the power to commit the trespass, is not one that furnishes the probable cause specified in the section, it is not easy to conceive of any other grounds of belief which would have more plausibility. But this is the very point upon which, as we understand the act of 1845, the legislature have placed the trespasser's exemption from treble damages. Ignorance of the fact or the law is the matter which relieves the defendant from the penalty inflicted upon wilful and wanton trespassers.

It is said that this second section of the charter of this company is unconstitutional. This may be so ; but the question is, whether the company honestly believed they had a right to use the plaintiff's timber, and were acting under the supposed authority conferred upon them by their charter. It matters not that they were mistaken in so believing and acting. Their ignorance of constitutional law will not excuse them from paying the actual damage occasioned by their trespass ; but it ought to relieve them from the penalty inflicted upon those who knowingly commit such trespasses. We concede that under the circumstances it could not be said that the company had any reason to suppose that *literally* the land or the timber was theirs ; but the spirit of the law is to punish wilful trespasses, and not such as are committed upon a false opinion.

The case of Emerson v. Beavaus, 12 Mo. 511, does not conflict with this view of the statute. The defendant in that

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case sought to relieve himself from the increased damages by proof that he supposed the land upon which the trespass was committed to belong to the United States; but he did not pretend that he had any more authority to trespass on the United States land than upon that of any private citizen, and of course the plea was rejected. The defendant was mistaken as to the party whose right he was invading, but he was fully aware he was committing an unwarranted trespass.

The other judges concurring, the judgment is affirmed.

THE STATE, Defendant in Error, v. DWIRE *et al.*, Plaintiffs
in Error.

1. Where the facts in evidence will warrant it, the court should instruct the jury that they *may* reject the whole of the testimony of a witness who has wilfully sworn falsely in regard to any material fact.

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103	210
25	553
107	161
25	553
49a	589
25	553
5da	426

Error to St. Louis Criminal Court.

L. M. Shreve, for plaintiffs in error.

C. G. Mauro, (circuit attorney,) for the State.

RICHARDSON, Judge, delivered the opinion of the court.

The defendants were indicted for a riot that occurred at a fire in the city of St. Louis. One of the witnesses called by the State testified that he saw three of the defendants present participating in the riot, and on his cross-examination, in answer to a question put by defendants, he denied that he had stated to two persons, whose names were given, that he had not seen Dwire at the fire—one of the defendants whom he had implicated. The defendants afterwards introduced the persons referred to in the question, who contradicted the witness, and testified that, at the time and place indicated in the question, he told them that he had not seen Dwire on the night of the fire.

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At the close of the evidence the court refused an instruction, asked by the defendants, to the effect that if the jury believe from the evidence that the witness wilfully testified falsely to any material fact in the trial, *they were authorized* to discard the whole of his testimony.

The instruction did not assert a mere abstraction, but was warranted by the state of the evidence in the case; and being drawn in the words of an instruction approved by this court, in Gillett v. Wimer, 28 Mo. 77, it ought to have been given. The facts in evidence that will warrant this instruction are not necessarily such as even to create a suspicion in the mind of the judge that the witness has knowingly sworn falsely to any material matter; for it may often happen that his evidence will be received with perfect confidence in its truth, while that of his assailants will be disregarded. But when a witness is contradicted in a material fact, it is for the jury to pass on his credibility, and the party against whom the evidence is given is entitled to the declaration of law from the court contained in the refused instruction. Other witnesses implicated the defendants, but this court can not tell how far the verdict was influenced by the testimony of this witness; and though the jury may believe that he had not been successfully contradicted, the judgment must be reversed because the defendants were denied the benefit of an established rule of evidence, to be declared in the form of an instruction, and which they were entitled to for whatever it was practically worth.

In my opinion, if the jury believe that a witness has wilfully testified falsely in respect to any material fact, it is their *duty* to disregard the whole of his testimony, and they should be so instructed by the court; but the other members of this court think that the jury ought only to be told that they *may* do what I think they are *bound* to do; and whilst they concur in the reversal of this judgment because a case was presented for the application of the principle contained in the instruction, they think the word "authorized" is equivocal, and should not be used in this connection, because it may imply

State v. Stone.—Smith v. Phillips.

to the jury that they are required to do only what they are at liberty to do.

The judgment will be reversed and the cause remanded.

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THE STATE, ON THE RELATION OF WASHINGTON COUNTY, v.
STONE, Judge of Ninth Judicial Circuit.

1. A writ of *quo warranto* is a writ of right, and issues as a matter of course upon demand of the proper officer.

Frissell, for Washington County.

RICHARDSON, Judge, delivered the opinion of the court.

Washington County has filed a motion for a writ of *quo warranto* against Judge Stone, alleging that he has, as judge of the ninth judicial circuit, approved the official bond of John Edwards as clerk of the circuit court of Iron county. The object of the motion is to initiate a proceeding to test the constitutionality of the act of the general assembly, approved February 17, 1857, organizing Iron county.

It was decided by this court, in the case of The State v. St. Louis Perpetual Ins. Co., 8 Mo. 330, that the writ of *quo warranto* was a writ of right and issued as a matter of course on demand of the proper officer, and the motion will therefore be overruled. The other judges concur.

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SMITH *et al.*, Appellants, v. PHILLIPS, Respondent.

1. A party relying upon a sheriff's deed to show title in himself, must produce the deed itself in evidence; unless its absence be accounted for, secondary evidence of its contents can not be admitted.
2. Hearsay evidence is inadmissible.

Appeal from Perry Circuit Court.

This was an action in the nature of an action of ejectment. The plaintiffs assert title to the tract of land in dispute as

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heirs of one Henry Clark. The defendant in his answer denies plaintiffs' title, asserts title in himself, and sets up the statute of limitations.

At the trial the defendant, to show title in himself, introduced in evidence, against the objection of plaintiffs, a record of acknowledgment by the sheriff of Perry county of a deed from himself as sheriff to one Gustavus A. Bird. This acknowledgment purported to be an acknowledgment of a deed executed by said sheriff, conveying to said Bird "a tract of three hundred arpens of land, more or less, situate, lying and being in Bois Brule township, in the county of Perry, which tract of land was sold by virtue of a decree or order of sale issued from this court in favor of Gustavus A. Bird, Ezekiel B. Herrick, executors, and Penelope Bird, executrix of Amos Bird, deceased, against Henry Clark, and was sold on the second day of the present term of this court, and whilst the court was in session, conformably to notice, and was purchased by said Gustavus A. Bird, he being the highest and best bidder, for the sum of eighty-five dollars." One Sanders also testified, against the objection of plaintiffs, that he had heard from one Logan, under whom defendant claimed title, and others, that Bird sold said tract to Logan.

T. C. Johnson and Gale, for appellants.

I. The defendant did not show title out of plaintiff. The sheriff's deed, if any was in existence, should have been produced. The acknowledgment was inadmissible in evidence. The description therein was also defective. Nor has the defendant shown title in himself through Logan. The declarations of Logan were inadmissible in evidence.

II. The defendant did not make out a defence under the statute of limitations. (Blair v. Smith, 16 Mo. 273; 6 Serg. & Raw. 25; Sarber v. Willing, 10 Watts, 141; Small v. Proctor, 15 Mass. 495; Boston Mill Corp. v. Bullfinch, 6 Mass. 229; 10 Mass. 93; 3 Metc. 125; 6 Pick. 172; 8 Pick. 292; 10 N. H. 397; 18 Verm. 294; 9 Watts, 192; 6 Barr, 271.)

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Noell and Frissell, for appellants.

I. The only question is as to the effect of the statute of limitations upon the state of facts proven. There is a clear bar. (13 Mo. 335; 16 Mo. 273; 19 Mo., 660; 20 Mo. 186.) The proof of the acknowledgment of the sheriff's deed to Bird, with a continuous subsequent possession under Bird's claim, is sufficient to raise the presumption at this date that such a deed did exist, if it is not positive proof thereof.

II. There was no error in permitting Sanders to state that he had heard Logan say he had bought of Bird. It was competent evidence while Logan was in possession to show how he claimed, and to show that his claim was not confined to the deed to himself from Henry Clark. Logan's sale of the whole tract to Sanders was an open assertion of dominion over it, and also shows the extent of his possession.

RICHARDSON, Judge, delivered the opinion of the court.

The best evidence of which the case is susceptible must be produced, and evidence is never primary when it carries on its face the indication that better exists. The law requires a sheriff, when he sells real estate under execution, to execute, acknowledge and deliver a deed to the purchaser, on complying with the terms of sale; and whenever title is asserted under a sheriff's sale, the production of a deed is required or its absence accounted for as a preliminary to the introduction of secondary evidence of its contents. The copy from the record of the sheriff's acknowledgment was read by the defendant, to prove that a deed had been made to Bird; but it indicated on its face the existence of better proof of the fact sought to be established by it; and the most that could be claimed for it was, that it was secondary evidence, which was inadmissible in any aspect of the case, without proof of the previous existence and loss of the deed.

Whether there are degrees in the various kinds of secondary evidence, it is not important to discuss, nor to decide whether, admitting the previous existence of a deed from the

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sheriff and its loss, the record entry read by the defendant was the best evidence of its contents ; for no foundation was laid for the introduction of secondary evidence of any kind or in any degree. The testimony of the witness that he had heard that Logan had purchased the land in controversy from Bird was also improperly admitted, and for these reasons the judgment, with the concurrence of the other judges, will be reversed and the cause remanded.



THE STATE, Defendant in Error, v. BANKHEAD, Plaintiff in Error.

1. An indictment, founded on section 28 of article 8 of the act concerning crimes and punishments (R. C. 1845, p. 404), charging that the defendant, on, &c., at, &c., "did disturb a congregation of people then and there met for religious worship, by then and there making an assault upon one H., so near to the place of worship of said congregation of people as to disturb the order of the meeting, contrary," &c., is insufficient.

Error to Pike Circuit Court.

Broadhead, for plaintiff in error.

C. G. Mauro, (circuit attorney,) for the State.

RICHARDSON, Judge, delivered the opinion of the court.

The defendant was indicted under the 28th section of art. 8 of the act concerning crimes and punishments. (R. C. 1845. p. 404.) The indictment contained four counts, but the jury found the defendant guilty only under the third, which is in these words : " And the jurors aforesaid, on their oaths aforesaid, further present, that the said Archer Bankhead, on the day and year aforesaid, and at the said county of Pike, did disturb a congregation of people then and there met for religious worship, by then and there making an assault upon one John F. Hedges, jr., so near to the place of worship of said congregation of people as to disturb the order of the meeting, contrary," &c.

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The court overruled the motion in arrest, and the only question presented in the record is the sufficiency of the said count. The section on which the indictment was framed describes two distinct classes of offences, and may be subdivided thus : First, " Every person who shall wilfully, maliciously or contemptuously disquiet or disturb any congregation or assembly of people met for religious worship, by making a noise, or by rude or indecent behavior, or profane discourse, within their place of worship, or so near to the same as to disturb the order or solemnity of the meeting," &c. ; 2dly, " or menace, threaten or assault any person there being, he shall be deemed guilty of a misdemeanor," &c. The count is not good under the first head, for it omits to charge any offence in the terms of the law. It does not charge that the defendant *wilfully, maliciously or contemptuously* did any thing ; and, to create an offence, this constituent of motive is required, besides the averment that the assembly met for religious worship was disturbed, and the description of the particular means used for that purpose. It is insufficient under the second head, for it attempts to charge under the first for disturbing a religious congregation, and only describes the assault as the means employed. In one case, the offence is for wilfully, maliciously or contemptuously disturbing an assembly of people met for religious worship, by any of the acts designated ; and in the other, the offence is for assaulting a person in such assembly. With the concurrence of the other judges, the judgment is reversed.

**CLARK & LEMON, Respondents, v. BROWN, Appellant.**

1. The mechanics' lien act of 1845 (R. C. 1845, p. 738) regulated proceedings instituted in St. Louis county to enforce a mechanic's lien in cases where the materials were furnished or the work performed under a contract with the owner.
2. Where the owner of a building, upon which there is a mechanic's lien for materials furnished under a contract with himself, conveys the premises to

25	559
53a	312
25	559
56a	517
35	559
122	176
25	559
74a	363

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a purchaser before the institution of a suit to enforce the lien, no judgment can be rendered, in a suit to enforce the lien commenced by *scire facias*, unless the purchaser be made a party to the record; nor if, in such case, suit be brought in the ordinary form against the vendor, could an execution issue against the property unless a *scire facias* shall have first issued and been served upon such purchaser.

Appeal from St. Louis Land Court.

J. R. Barrett, for appellant.

- I. The description of the property was insufficient.
- II. Blood should have been made a party. He was owner when the demand accrued, when the lien was filed, and when the suit was brought.

III. No other judgment could have been entered in this case than a judgment against the property. The owner should have a hearing. The transfer from Brown to Blood, made subsequent to the contracting for furnishing the materials, and the actual furnishing of the same, would have been no defence to an action in the ordinary form against Brown; but it is a defence to an action against the property, if Blood, the owner, be not made a party. Hence the instruction given for plaintiffs was erroneous.

Hart & Jecko, for respondents.

- I. The court ought not to have required Blood to be made a party. Plaintiffs had no contract with him. The materials were furnished under a contract with Brown and with him alone. The instrument of writing read in evidence shows that Blood bought out Brown's interest with knowledge of the demands against the building. No act of Brown or Blood could deprive plaintiffs of their lien on the building.

RICHARDSON, Judge, delivered the opinion of the court.

This was a proceeding by *scire facias* to enforce a lien for materials. On the 31st of August, 1850, the plaintiff filed in the clerk's office of the circuit court a statement of their demand, verified by affidavit, and a description of the property upon which the lien was intended to apply. The statement

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alleged that the plaintiff's demand amounted to \$290.92 for materials furnished by them and used by Brown, under contract with him, in building the house described, which was erected and owned by Brown upon land belonging to Strother's heirs. It appears from the account, made part of the statement, that the lumber was furnished at different times from May 9th to July 31st, 1850, inclusive. A *scire facias* was sued out on the 22d October, 1850, containing the usual recitals, and stating that it appeared Brown was the owner of the building. At the return term of the writ the defendant filed his plea, and afterwards at the April term, 1852, it was stricken out on motion, and the court ordered that "the *scire facias* be amended by bringing in J. H. Blood as a party to the suit." At the November term, 1853, the plaintiff dismissed the cause as to Blood, and afterwards, during the same term, Brown filed his answer, averring, among other things, that the property described in the *scire facias* was owned by Blood when the plaintiffs' demand accrued and when they filed their lien.

On the trial evidence was offered by the plaintiffs tending to prove that the defendant owed them the said account, and that it accrued for materials furnished by them under contract with Brown and used by him in building the house mentioned in the *scire facias*, and that the building was owned by him at the time.

On the part of the defendant a lease was read in evidence executed by Clark to Brown, dated February 20th, 1850, from which it appears that Clark had leased from Mrs. Strother a portion of land, and then subleased to Brown for the term of twenty years, commencing November 7, 1849, the premises on which the building was erected; also an assignment of said lease and "the building and improvements on the premises then erected and in process of erection and to be completed" by Brown to John H. Blood, dated 26th July, 1850, which was duly acknowledged and filed the next day for record in the proper office.

The court substantially instructed the jury that the plain-

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tiffs were entitled to recover whether or not Blood became the owner of the property before the filing of the lien or the commencement of the suit. The jury found for the plaintiffs the amount of their claim with interest, and thereupon the court rendered judgment that—it appearing the demand, upon which the action was founded, was properly filed as a lien against the property described in the *scire facias*, and that part of the property could not be separated from the residue without great injury to the whole—the plaintiffs “recover of said defendants the damages aforesaid, in form aforesaid, as assessed against said defendant and against the property above described,” with the award of execution, &c.

The questions in this case must be determined by the local act concerning liens in St. Louis county of 1843, and the general act concerning mechanics’ liens of 1845; and though the provisions of the special act must prevail when they are in conflict with the general law, it will be found that the person who performs work or furnishes materials under a contract with the owner must employ the means for the enforcement of the lien provided in the general act; for the special act does not furnish the machinery for that purpose. (3 Schulenburg v. Gibson, 15 Mo. 288.)

After a party has performed work or furnished materials for a building under a contract with the proprietor thereof, and proceeded as directed by the second section of the act of 1845, he can pursue either of two remedies provided in sections seventh and eighth.

First, as to remedy under the seventh section, “he may commence his suit in the ordinary form, and shall have judgment against the original debtor for the amount that shall be found due to him, and shall have the liberty of taking his execution against such a proportional part of the property charged with the lien as his demand bears to the whole amount of liens that are charged upon the property under this act, which proportional part shall be decided by the court, and also against other property of the defendant.” This section gives him a general judgment, and in addition a

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special *fieri facias* against the property charged with the lien, on one of two conditions expressly named in these words: "But no execution shall issue against the property charged with such lien unless the defendant shall have owned or possessed the said property at the time of the commencement of the said suit, or unless a *scire facias* shall first have issued and been served upon the owner or possessor of such property, requiring him to appear and show cause why judgment should not be entered up and execution had against such property."

The policy and justness of this provision need no vindication. The *lis pendens* is notice to the world that a lien is claimed against particular property, and the law forbids that any alienation or encumbrance of it by the debtor should defeat the meritorious claim of the person who, by the contribution of his labor or materials, has enhanced its value; and hence the judgment is against the property, besides the general judgment if the defendant owned or possessed it at the commencement of the suit. But the law repudiates the idea of condemning the property of one man to pay the debt of another, without giving him an opportunity in court, upon due service of process, of showing that the claim ought not to be asserted against his property; and under this section the plaintiff will take nothing but a general judgment unless the defendant owned or possessed the property at the commencement of the suit, or unless a *scire facias* shall first have issued and been served on the owner or possessor thereof.

Secondly, as to the remedy under the eighth section. The papers which the plaintiff files with the clerk, if properly prepared and filed in time, stand in place of a declaration and are treated as a record (*Cornelius v. Grant*, 8 Mo. 59); so that an original summons is dispensed with, and the *scire facias* is the first process. The word "whom" in this section, evidently, from the context and spirit of the act, was intended for "which," and the section should read thus: "In all cases under this act it shall be lawful for the plaintiff to proceed by *scire facias* against the original debtor, and against all and every person or persons owning or possessing the property

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against *which* he wishes to proceed ; but no judgment to be rendered on the *scire facias* shall authorize the issuing of any execution except against the property charged with said lien, or such part thereof as the court shall direct." If a party proceeds under this section, he can not take a personal judgment against the original debtor ; but, in any event, can only have a judgment against the property charged with the lien. It is essentially a proceeding *in rem*, that seeks to condemn the property to satisfy a legal claim against it. And, as there can be no general judgment against the original debtor, if he is absent or insolvent, or is indifferent about protecting his vendee, he may have neither motive nor interest to defend the suit, or may even be in collusion with the plaintiff ; and therefore the plainest dictates of justice require that the real owner, whose property it is proposed to condemn to pay another's debt, should at least have the opportunity of being present to show that no lien lawfully exists against his property.

There is nothing in the seventh and eighth sections of the act of 1845 in conflict with the sixth section of the local act of 1843, which declares " that the lien for work and materials as aforesaid shall be preferred to all other encumbrances which may be attached to or upon such building or other improvements on the ground, or either of them, subsequent to the commencement of such building or improvements ;" but they direct the mode of bringing before the court all parties interested in the property at the time of the commencement of the suit.

This proceeding was commenced by *scire facias*, and the proof shows that Blood was the purchaser from the defendant, with a recorded deed, not only before the suit was begun, but before the last of the materials were furnished, and, in our opinion, no judgment could be rendered in the case without the presence of Blood on the record.

If it be said that Brown owed the debt, and had no right to object to the judgment being rendered, it may be replied that he ought to have paid it, and the argument would be unan-

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swerable, if the proceeding affected nobody but himself; but if the court had no authority, as the case stood, to render a judgment against Blood's property to pay Brown's debt, any party to the record had a right to object.

The other judges concurring, the judgment will be reversed and the cause remanded.

THE STATE, Respondent, v. SHEHANE, Appellant.

1. To authorize an appeal to the Supreme Court, final judgment should have been rendered in the court from whose decision the appeal is taken.
2. Instructions to a jury should be incorporated into a bill of exceptions; otherwise they will be disregarded by the Supreme Court.

Appeal from Oregon Circuit Court.

25	565
32a	465
25	566
98	674
25	565
115	478
25	565
69	147
25	565
146	128
26	565
159	881

SCOTT, Judge, delivered the opinion of the court.

The defendant was convicted of murder in the first degree, and afterwards appealed to this court. From the transcript filed it does not appear that any final judgment has been rendered in the cause. Until there is a final judgment, no appeal nor writ of error can be sustained. This appeal then must be dismissed. If the judgment has been pronounced and the clerk has failed to enter it, the record may be amended on proper application for that purpose; or if no judgment has been given, the defendant may yet be brought into court and sentenced, and then he will have a right to his appeal or writ of error. If there was a sentence pronounced or judgment given, and by reason of the failure of the clerk to enter it the time has passed within which by such judgment the defendant should have been executed, the court will again sentence the defendant, proceeding in conformity to the 25th and 26th sections of article 7 of the act to regulate proceedings in criminal cases. (R. C. 1855, p. 1200.) The record however will be amended so as to show the first sentence, if

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there was any, although the time for the execution of the sentence may have elapsed.

It appears that there was a change of venue in this case from Ripley to Oregon county. The transcript from Oregon, where the trial took place, has no caption to it; nor is there any certificate of the clerk authenticating it. Both of these omissions must be supplied. There is nothing in the record showing what became of the cause after the overruling of the motion for a new trial. Surely the proceedings did not end there. Unless more care is taken in making up the records in criminal cases it will be impossible to sustain convictions, and our penal laws will become a dead letter. There are no instructions presented in the record. Instructions should regularly be incorporated in the bill of exceptions. Although they may appear among the papers in a cause and be spread upon the transcript, they will be disregarded unless they form a part of the bill of exceptions. So there is no bill of exceptions preserving the evidence in the cause. The paper containing the substance of the evidence and signed by the judge is no bill of exceptions. There does not seem to have been any point raised on the evidence as preserved in the record; of course, then, there could have been no bill of exceptions. There is a good deal of confusion created and much unnecessary delay in requiring more than one bill of exceptions in a cause. The law requires that an exception must be taken at the time the point made is decided; but this does not mean that the bill of exceptions shall be prepared and signed at the time. It is enough that the point is noted, and afterwards, when the trial is ended and the motion for a new trial is overruled, if there should be one, then the losing party will prepare a single bill of exceptions, in which will be preserved all the points ruled against him in the progress of the trial. This is now the practice adopted by most of the circuits in the state, and its superiority over the other mode should commend it to every one. This court never reviews the instructions given in a cause unless so much of the evidence

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is preserved in the bill as shows that the point saved by it arose on the trial.

The other judges concurring, the appeal is dismissed because there is no final judgment in the cause.

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HARRIS et al., Appellants, v. **HARRIS et al.**, Respondents.

1. To entitle a party to a suit, under the eleventh section of the twenty-fourth article of the practice act of 1849, or the third section of the act concerning witnesses (R. C. 1855, p. 1577), to examine as a witness in his behalf a party to the suit, the party summoned must be an *adverse* party, and not merely an opposing party on the record.

Appeal from Pike Circuit Court.

Broadhead, for appellants.

I. The court erred in excluding the testimony of Mrs. Whitlock.

Henderson, for respondents.

RICHARDSON, Judge, delivered the opinion of the court.

This was a proceeding, under the 31st section of the act concerning wills (R. C. 1845, p. 1083), to contest the validity of the will of Lewis Harris. The petition was filed by three of the heirs at law—two of whom were the administrators of the estate—against the widow, the other heirs at law, and the legatees under the will. On the trial the plaintiffs offered to read in evidence the deposition of Mrs. Whitlock, one of the defendants, who was one of the children of the testator and also one of the legatees of the will; but it appeared that she would receive a larger interest in the estate as heir at law, if the will were set aside, than she would take under the will as legatee, and on the objection of her co-defendants the deposition was excluded. The propriety of this decision presents the only question to be considered. The petition is silent as to the reason she was made a defendant.

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At common law the witness would be incompetent for two reasons ; first, because she was a party to the record, and next, for the reason that she was interested in the suit on the side of the party calling her ; but it is insisted that the rules of the common law do not affect the question, and that it is to be determined by our statute law. The only provisions of the statute, that bear on the question, are contained in the act concerning witnesses, (R. C. 1855,) and are as follows : " Sec. 1. No person offered as a witness shall be excluded by reason of his interest in the event of the action. Sec. 3. Any party to a civil action or proceeding may compel any *adverse party*, or person for whose benefit such action or proceeding is instituted, prosecuted or defended, to testify at the trial or by deposition as a witness, &c. Sec. 6. The following persons shall be incompetent to testify : first, a party to the action, or any person for whose immediate benefit the action is prosecuted or defended, except as hereinbefore provided in this act," &c.

By the first section interest alone does not disqualify a witness ; but that section does not apply to a party to the action ; for the sixth section renders him incompetent to testify for himself, or to testify at all unless he is included in the exception referred to in the sixth section ; and though that exception evidently has reference to the third section, yet when a party attempts to avail himself of the third section, the person called as a witness must be an *adverse party* and not simply an opposing party on the record.

Under the code, as formerly in chancery, all persons interested in the subject of the action must be made parties ; and their relative position as plaintiffs or defendants is often immaterial, and is frequently assigned at the pleasure of the plaintiff, or under an arrangement with him. And though the statute requires that "if the consent of any one who should have been joined as plaintiff can not be obtained, he may be made a defendant, the reason thereof being stated in the petition," it would be very easy for one, who is interested in the relief sought, to refuse to join, in order that an advantage

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may be gained by his deposition as defendant, or, though willing to share the fruits of the litigation, would be unwilling to bear any of its expenses. If a defendant, who is not adverse in interest to the plaintiff, may be examined as a witness by the plaintiff, he can give evidence in his own cause and for his own benefit, which he could not do if he occupied his true position on the record ; and after he has testified he could call the plaintiff, and between them the other defendants might be sacrificed. Under the construction contended for by the appellants, it would be impossible to prevent collusion, or to prevent a party from testifying in his own behalf.

All the provisions of the statute we are considering are contained in the code of 1849, but not arranged in the same order ; and an examination of their contexts, in the acts that first introduced them, may aid us in construing them. The third section of the act of 1855 is the eleventh section of the 24th article of the act of 1849, and the first and sixth sections of the act of 1855 are found in the twenty-fifth article of the code of 1849 in this connection : " Sec. 1. No person offered as a witness shall be excluded by reason of his interest in the event of the suit. Sec. 2. *The last section shall not apply to a party to the action*, nor to any person for whose immediate benefit it is prosecuted or defended," &c. It will be observed that the provision that allows one party to call as a witness an adverse party is in the twenty-fourth article, and stood first in point of order. The first section in the next article, at one sweep, abolishes an old and well-established rule of evidence ; but the second section limits the operation of the first, and declares that it shall not extend " to a party to the action," and thus not only prevents a party from offering himself as a witness, but disqualifies an adverse party if he has an interest in favor of the party calling him ; and his competency on the score of interest is left unaffected by the statute, but must be determined by the familiar rules of the common law.

The Supreme Court of New York (*Hollenbeck v. Van Valkenburgh*, 1 Code R., N. S., 83) has given the same con-

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struction to like sections in their code ; and though the decision was made in 1850, we are not aware that it has been disturbed. The judgment is affirmed, with the concurrence of the other judges.

35 570
41a 323

RIDGELY, Appellant, v. STILLWELL, Respondent.

1. Although rent reserved be payable monthly, yet, if the letting be general and without limitation as to time, it will be a tenancy from year to year, and a month's notice to quit will not terminate the tenancy.

Appeal from St. Louis Land Court.

The facts sufficiently appear in the opinion of the court.

Knox & Kellogg, for appellant.

I. The evidence tended to show a tenancy from month to month. Defendant was entitled to only a month's notice to quit. The notice given was sufficient. Even if defendant had been a tenant at will the notice was sufficient. (R. C. 1855, p. 1012 ; 1 Pick. 43 ; 2 Pick. 70 ; 17 Mass. 282 ; 16 Mass. 1 ; 7 Cush. 346 ; 31 Maine, 212 ; 12 Ill. 470 ; 13 Metc. 275 ; 5 Porter, 523.) The old common law notice of six months to be served on a tenant from year to year was not intended for a case like the present, but for the protection of tenants cultivating the soil. In the present case the court should have submitted the question as to the nature of the tenancy to the jury.

Krum & Harding, for respondent.

I. As the tenancy of the defendant, as shown by the testimony, was from year to year, he was entitled to six months' notice to quit before his tenancy could be terminated. Neither of the notices offered in evidence were sufficient ; consequently there was no holding over by the defendant. (Murray v. Armstrong, 11 Mo. 209.)

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NAPTON, Judge, delivered the opinion of the court.

This was an action for unlawful detainer. From the evidence it appeared that the defendant went into possession of the premises in March, 1851, and had been in possession up to the commencement of the suit in 1856, and that the rent reserved was payable monthly. There was no written lease, although at the beginning of the tenancy there had been some talk of a lease for three or four years. A month's notice to quit was given; and the only question in the case is, whether that notice was sufficient—or, in other words, whether this tenancy was one from year to year, or at will, or from month to month.

We think the land court was right in holding this a tenancy from year to year. A general letting, without any limitation as to time—although the payment of the rent may be semi-annually, or quarterly, or monthly—is in construction of law a letting from year to year. This is fairly inferable from the opinions of the judges in the case of *Richardson v. Langridge*, 4 Taunt. 131. A tenancy at will must be created by express contract; for if the terms are indefinite, and do not necessarily imply such a tenancy, the courts will construe the tenancy to be one from year to year. So, a tenancy from month to month, or for any aliquot part of a year, may be created by express contract, or perhaps be implied from circumstances; but the circumstance that rent is payable monthly, or quarter-yearly, or yearly, or half-yearly, does not show that the holding is not yearly. In the absence of any other proof, the legal presumption remains that the tenancy is a yearly one. The cases cited from Massachusetts are decisions upon their statutes, which have materially modified the common law and are totally different from our acts on this subject.

The judgment is affirmed, the other judges concurring.

Schwartz v. Dryden.

SCHWARTZ, *et al.*, Plaintiffs in Error, v. DRYDEN *et al.*, Defendants in Error.

1. In partition sales, in statutory proceedings for partition, there is no warranty of title.
2. Where the parties to a statutory proceeding for partition have no title to a portion of the land, a purchaser, at the partition sale, of such portion—there being no fraud or misrepresentation—will not be entitled to have such sale set aside as to such portion on the ground of this want of title. (Scott, Judge, dissenting.)

Error to Marion Circuit Court.

A suit was instituted in the Marion circuit court for partition of certain tracts and lots of land among the heirs of Pocahontas Sloan, deceased. In this proceeding, John D. S. Dryden, as commissioner appointed by the court, sold to Charles Schwartz and wife and William Lindig a certain lot in the town of Palmyra, 305 feet in width, and 289 $\frac{1}{2}$ feet in length. Said lot had formerly belonged to Samuel C. Sloan, an ancestor of the parties to the proceeding for partition, who with his wife Pocahontas had conveyed all of said lot, except a strip of forty-one feet in width by 289 $\frac{1}{2}$ feet in depth on the east side of said lot, to trustees of the town of Palmyra to be used as a graveyard. The purchasers of said lot at the partition sale moved the court "for an order setting aside said sale for so much at least of said lot as had previously been sold by Samuel and Pocahontas Sloan to the trustees of the town of Palmyra for a graveyard, and directing the said commissioner, John D. S. Dryden, to refund to plaintiffs a proper proportion of the funds paid him upon the sale."

On the hearing of this motion it appeared in evidence that the proceedings for the sale of the land sought to be partitioned were not closed, but were still pending; that at the time of said sale by Dryden, as commissioner, he did not know that said Samuel C. and Pocahontas Sloan had made the conveyance above mentioned to said trustees; that the sale was made on the ground, and many graves were there in

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full view of the purchasers and other bidders ; that at the sale of this lot the question was publicly asked, whether there had ever been any conveyance made of the ground occupied by the graves, to which the commissioner, publicly, in the hearing of the bidders replied, he did not know ; that he had not examined the records, and that he only offered to sell whatever title the petitioners for partition might have in the lot. The court overruled the motion.

Lipscomb, for plaintiffs in error.

I. The parties to the partition had no title whatever to that portion of the lot included in the grant made by Sloan and wife to the trustees of Palmyra. The motion to set aside, having been made while the proceedings were yet open and pending, ought to have been granted. This case differs materially from *Owsley et al. v. Smith's heirs*, 14 Mo. 155. In that case the heirs of Smith claimed title. In this case the heirs of Sloan do not claim title. They admit absolute conveyance by their parents as early as 1832. Again, in *Owsley v. Smith's heirs*, the proceedings for partition had been closed, and Owsley sought to enjoin a judgment obtained for the purchase money. Here the proceedings for partition are yet open and pending. The motion to set aside had been made at the earliest moment. The commissioner, who is also the attorney who brought the suit for partition and defendant in this motion, was ignorant of the conveyance of 1832. By mistake the suit embraced the land sold in 1832. Equity and good conscience require that the motion should prevail.

Dryden, for defendants in error.

I. The plaintiffs in error were purchasers at a judicial sale. There is no pretence of fraud or misrepresentation. The maxim "*caveat emptor*" applies. (*Owsley v. Smith's heirs*, 14 Mo. 153.)

II. The plaintiffs ask to set aside the sale as to part only of the property sold. If set aside at all, it would have to be set aside in *toto*. The relief can not be had by motion.

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NAPTON, Judge, delivered the opinion of the court.

In the case of Owsley et al. v. Smith's heirs, 14 Mo. 153, this court held that in partition sales under our statute there was no warranty of title. This decision is based upon the particular phraseology of our statute, and seems to have been acquiesced in. No case has been brought up to this court, since that decision, in which the court has been asked to review the subject ; nor is it attempted in this case.

Regarding this point as settled, the plaintiff, who was the purchaser of a lot in Palmyra at a partition sale made by a commissioner, applies to the court to set aside so much of the sale as included a part of the premises he purchased to which it turned out there was no title in the parties to the partition. It seems that the sale was made upon the premises ; that a portion of the lot was covered by a graveyard ; that inquiry was publicly made whether this portion of the lot had ever been conveyed away by the ancestor of the petitioners ; and that the commissioner publicly stated "he did not know ; that he had not examined the records ; that he only offered to sell whatever title the petitioners might have in the lot."

It is not doubted that where fraud or misrepresentation has occurred, or where the purchaser has been led into a mistake by the conduct of the seller, a court has ample authority, at all events previous to a confirmation of the report, to set aside the sale. No fraud or misrepresentation is alleged in this case, and the circumstances show that if the purchaser was led into mistake, it was not superinduced by the conduct of the commissioner or the petitioners, but resulted from the grossest negligence of his own. The graveyard was visible, and the subject was inquired into. The deed which had conveyed it was upon record, and the commissioner stated that he had not examined the record. Whether, under these circumstances, the portion of the lot thus covered with graves was regarded as of any value by the purchaser when he made his bid would not seem very clear. But if the court is justified in setting aside the sale at all, it ought, under such

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circumstances, be set aside altogether. It may be that the portion of the lot to which there was good title was worth, and would have brought, the full amount of the bid. But the purchaser does not ask this; he desires simply a *pro rata* deduction from his bid. This can not be allowed; for, although he may be injured, that injury is plainly the result of his own negligence and not brought about by the conduct of others. Judge Richardson concurring, the judgment is affirmed.

SCOTT, Judge, dissenting. I do not regard a sale in partition as being similar to a sale on a judgment at law. A sale under an execution is always considered as *in invitum*. Not so with a sale in partition; but it is a kind of sale by the parties themselves. A sale by partition is becoming in this state a usual mode of conveyance; and if it should be treated as a sale under a judgment, at which the rule *caveat emptor* applies, our courts will be made cloaks for many fraudulent contrivances to deceive innocent purchasers. When a title to land has been investigated by a court, and an order for its sale has been made, it is supposed, as the courts would not be made instruments of fraud, that the parties to the suit in partition have title to the land which is ordered to be sold. Courts should not make partition nor order sales unless they are satisfied that there is a title in those who are seeking its assistance. If it is established that the rule *caveat emptor* applies to sales in partition, speculators will be emboldened to seek a sale in partition of any tract of land they fancy, in the hope they may entrap the unwary. In judicial sales the courts will relieve purchasers against encumbrancers and defects in title; and why should this form of sale, which is becoming so common and which may so readily be perverted to purposes of fraud, be made an exception? In the case of Smith v. Brittain, 8 Ired. Eq. 347, it was held that a sale by a clerk and master, under a bill praying the sale of land for partition, is but a mode of sale by the parties themselves. It is not merely a sale by the law, *in invitum*, of such interests

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as the parties have or may have—in which the rule is, *caveat emptor*—but professes to be a sale of a particular interest stated in the pleadings to be vested in the parties, and to be disposed of for the purpose of partition only. If a purchaser pays his money on a master's sale, and discovers a defect in the title at any time before a conveyance executed, he may recover it back. So in the case of Jackson v. Edwards, 22 Wend. 509, the court, speaking of a sale in partition, says: “Although these chancery sales are not made with warranty, it is the established course of practice of the court, whenever any objection is taken, if not in all cases, to refer it to a master to ascertain and report whether a good title can be made to a purchaser.”

The case of Owsley et al. v. Smith's heirs, 14 Mo. 158, has not been overlooked by me.

KINNEY, Respondent, v. MILLER, et al., Appellants.

1. Matter set up in an answer as a counter claim should be separately stated.
2. Where an answer improperly blends and defectively states matters set forth therein as a defence and as a counter claim, the proper mode of taking advantage of the defect is, not by demurrer to the whole answer, but by motion to strike out either the whole of it or such portions as are defectively pleaded.

Appeal from Stoddard Circuit Court.

This was an action on a promissory note for \$350 executed by defendants. The court sustained a demurrer to the following answer: “Defendants, for answer to plaintiff's petition, say, they admit that they executed the note sued on, but defendants further state that they were induced to execute the said note by false and fraudulent representation of plaintiff—that is to say, plaintiff induced defendants to believe that he was the owner of the west half of the south-east quarter, and the east half of the south-west quarter of section thirty-six, in township, &c., containing one hundred

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and sixty acres, and by the false and fraudulent representations of plaintiff, as aforesaid, thereby induced Stephen Miller, the defendant first above named, to purchase the above described real estate of plaintiff, for which the said note was executed by said Stephen as principal and F. W. Miller as his security; when in truth and in fact the said plaintiff had no right whatever to the west half of the south-east quarter of section thirty-six, in township, &c., containing eighty acres, but said land belonged at that time to the Cairo & Fulton Railroad Company of Missouri. And defendant further states that he has made valuable and lasting improvements on said land by clearing the land of trees and brush, and putting up fencing thereon, and digging of well, worth two hundred dollars. Therefore defendants ask that the contract be rescinded and the note cancelled; and defendants further state that by the false and fraudulent representations aforesaid, made by the plaintiff to defendants, they, defendants, are damaged to the amount of five hundred dollars; for which they ask judgment."

The sustaining a demurrer to this answer constitutes the error complained of.

Noell, for appellants.

I. The court erred in sustaining the demurrer to the answer. The answer set up a good defence. The fact that the title to one half the land had failed was a sufficient ground for a rescission of the contract of sale. At all events defendants were entitled to a recoupment of damages against the claim for the purchase money. (16 Mo. 369; Coffman v. Huck, 19 Mo. 435; 24 Mo. 496.)

RICHARDSON, Judge, delivered the opinion of the court.

According to the present practice a demurrer will not lie to an answer except so far as it contains new matter constituting a counter claim. The whole subject is regulated by article 6 of Practice in Criminal Cases. (R. C. 1855, p. 1226.) The only pleading on the part of the defendant is

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either a demurrer or an answer. (Sec. 4.) The office of a demurrer is defined in the sixth section; and the answer must contain, “*First*, a special denial of each material allegation of the petition controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; *Second*, a statement of any new matter constituting a defence or counter claim, in ordinary and concise language, without repetition.” (Sec. 12). The counter claim can not be for *any* cause of controversy between the plaintiff and defendant, but “must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: *First*, a cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff’s claim or connected with the subject of the action; *Second*, in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action.” (Sec. 13.)

The matter constituting the counter claim ought not to be blended with the matter intended simply as a defence, but should be separately stated, with all the distinctness that would be required if the defendant was suing the plaintiff in an independent proceeding; and the objection for improperly blending statements touching the defence and those relating to a counter claim may be raised by motion to strike out. The defendant may set forth as many “counter claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both,” but “they must each be separately stated, in such manner that they may be intelligibly distinguished, and refer to the causes of action which they are intended to answer” (sec. 13); and a violation of this rule will invite a demurrer.

If a defendant has a defence and also counter claims, he ought in the answer to state separately, in one portion of it, every thing which properly goes to the defence, and then distinctly state, in the nature of separate counts, matter intended as counter claims. If that part of the answer which

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goes only to the defence, as such, is defective in whole or in part, for any of the reasons that apply to ordinary answers, the objection may be taken by motion to strike out the whole or such parts as are insufficient. Then as to the counter claims, the plaintiff may demur to such as are insufficiently stated, for the reasons that apply to petitions so far as they are applicable, or that they are not allowed by the 13th section. The demurrer must point specifically to the counts or counter claims at which it is aimed, and the plaintiff may demur to one or more and reply to the others ; and if the reply is insufficient the defendant may demur. (Sec. 17.) If the reply contains redundant, impertinent or irrelevant matter, and yet is not obnoxious to a demurrer, such matter may be stricken out on motion. Rejoinders are not allowed, but the cause is at issue when the replication is filed and has escaped a demurrer or motion. (Sec. 19.) If the counter claim contains a cause of action, and is not subject to the operation of a demurrer, but contains matter which of a like character in a petition would be stricken out, such matter may be reached by a motion to strike out.

Applying these rules to this case, it will be observed that though the matter intended as a counter claim is so mixed with that part intended as a defence that it is difficult to see where one ends and the other begins, yet the objection could not be taken by demurrer ; for the demurrer is to the whole answer, and it can not legitimately operate on any thing but that part which is intended as a counter claim. The proper mode of taking advantage of the bad pleading of the defendant was by motion to strike out. If the whole answer was bad, the motion should have been directed to the whole of it, or to such parts as were insufficiently stated or improperly pleaded. The facts stated in the answer showed a partial failure at least of the consideration of the note, caused by the misrepresentation of the plaintiff, and the facts alluded to in the answer, if true and charged in proper form and with sufficient legal precision, might entitle the defendant to a rescission of the contract of purchase.

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It does not appear by any positive averment that the plaintiff knew, at the time of the sale, that he had no title to part of the land, or that the purchaser was deceived, or that the tract which belonged to the railroad company was the inducement to the purchase of the other part. These facts or some of them would be important in considering the question whether there was a partial or total failure of consideration; but in any view there was enough in the answer to save it from the summary and irregular disposition the court made of it. The defendant should have leave to amend his answer. The other judges concurring, the judgment will be reversed and the cause remanded.



JOHNSON, Respondent, v. DICKEN, Appellant.

1. Instructions, to become a part of record, must be incorporated into a bill of exceptions.
2. Words charging a person with stealing in a sister state are actionable *per se*.
3. In a suit for slanderous words spoken of a wife, she should be joined with her husband as a party to the suit; the husband alone could not recover unless he avers and proves special damage.
4. Where in a suit for slander—in which slanderous words against the plaintiff and also against the plaintiff's wife, who is not a party to the suit, are charged, and evidence is received upon both charges—the jury assesses entire damages, it will be presumed that some part of the damages was assessed upon the count or cause of action for words spoken against the wife, although this count or cause of action may have been defective; in such case the judgment shall be arrested.

Appeal from Stoddard Circuit Court.

Noell, for appellant.

I. The court erred in giving the instruction asked for by plaintiff. The words alleged in the petition are not of themselves slanderous: There is no allegation that by the laws of Illinois taking or stealing of corn is a crime, and the courts of this state will not take judicial notice of the laws of ano-

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ther state regulating their own internal affairs. Nor is there any allegation that he meant by the words used to charge plaintiff with a felonious stealing. It was error then to charge the jury that proof of the words alleged in the petition was sufficient. The proof must go beyond the petition to justify a verdict. Taking the corn may have been an innocent act for aught that appears in the petition in reciting the words used.

II. The court erred in overruling the motion in arrest. The words used are not such as of themselves import a slander or imply that plaintiff was guilty of a crime by the laws of Illinois. Besides, so much of the petition as charges slanderous words or any words having been spoken by defendant of plaintiff's wife is insufficient. An action can not be maintained by the husband alone for slanderous words used concerning his wife, especially where no allegation is made of special damage to the husband by reason of such slander. (1 Starkie on Slander, 348-9.) There was a misjoinder of causes of action. An action for slander of the husband can not be joined with an action for slander of the wife, the wife not being a party to the suit and no special damage to the husband being alleged.

III. The court also misdirected the jury by instructing them that it was sufficient to enable the plaintiff to recover if defendant reiterated a common report. (2 Starkie on Slander, 248.)

RICHARDSON, Judge, delivered the opinion of the court.

This was an action of slander commenced in 1855, and the petition was as follows: "The plaintiff states that on or about the first day of November, in the year one thousand eight hundred and fifty-five, at the county of Stoddard, in the state of Missouri, the defendant, said Christopher Dicken, spoke the following false and slanderous words concerning the plaintiff—that is to say, that plaintiff had stolen corn in Illinois and had to run away from there for it, and he (defendant) could prove it; and that the wife of the defendant

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had stolen a wagon load of corn, and that he dared plaintiff to put him to the proof of it ; by which plaintiff says he is damaged to the amount of ten thousand dollars, for which he prays judgment." The answer denied all the allegations in the petition. On the trial evidence was given tending to prove that the defendant spoke the words charged in the petition. Before the case was submitted to the jury, instructions were given by the court, and though they are copied into the transcript they are not preserved in the bill of exceptions. A general verdict was rendered for the plaintiff, and the defendant filed his motion for a new trial and in arrest, but both motions were overruled.

Instructions are not a part of the record, and because the clerk may copy them into the transcript they do not for that reason get properly before this court ; and it has often been decided that the Supreme Court will not review instructions unless they are incorporated in a bill of exceptions. (17 Mo. 49.)

The petition attempts to state in one count two separate causes of action, to-wit, that the defendant falsely said of the plaintiff that "he had stolen corn in Illinois, and had to run away from there for it," and, secondly, "that the wife of plaintiff had stolen a wagon load of corn."

It has been insisted that, as to the first cause of action, the motion in arrest ought to have been sustained, for the reason that the words are not actionable, in omitting the averment that stealing is a crime in Illinois. Without undertaking to define a rule as to the nature of the offence imputed to render words actionable *per se*, it is sufficient to say that larceny is an offence at common law involving moral turpitude and which subjects the guilty party to infamous punishment ; and though our courts will not take judicial notice of the laws of another state at variance with the common law, yet upon a common law question the presumption is that the common law of a sister state is similar to our own. (8 Mo. 7 ; 10 Wend. 75.) Slanderous words, spoken in reference to a transaction that took place in another state, will be ac-

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tionable *per se* in our courts, if an action of slander will lie for like words spoken in reference to a crime alleged to have been committed in this state. In *Cefret v. Burch*, 1 Black. 400, the defendant charged the plaintiff with having stolen hogs in Ohio; in *Vananken v. Westfall*, 14 Johns. 232, the actionable words were that the plaintiff had stolen money in Pennsylvania; and in the cases of *Offull v. Earlywine*, 4 Blackf. 460, and *Leaville v. Earlywine*, 4 Blackf. 469, the plaintiff was charged with having committed larceny in Kentucky. If the offence charged derives its quality as a crime from the statute alone, the rule would be otherwise. The right of recovery does not depend on the fact that the plaintiff would be amenable to our laws if the charge was true, for he might have been demanded as a fugitive from justice and punished in Illinois; and it is no less slander to charge a person with an offence for which a criminal prosecution is barred by limitation.

As to the slander of the plaintiff's wife, he had no cause of action without joining her in the suit, unless he had sustained special damages, which he was bound to aver and prove. (1 Starkie's Slander, 348.) For the words spoken of the wife an action might survive to her, and if the plaintiff is permitted to recover for the slander of his wife without uniting her in the suit, or alleging and proving special damage to himself, the defendant would be liable to make compensation twice for the same injury. There is clearly no cause of action properly stated for the slander of the wife, but proof was received on that charge; and as the jury assessed entire damages, it must be intended that some part of the damages was assessed upon that allegation, and for that reason the judgment should be arrested. (*Holt v. Scholefield*, 6 Term R. 691; *Gibbs v. Dewey*, 5 Cowen, 503.) It was the practice in England when there was a general verdict on a declaration containing several counts, some of which were bad, and evidence had been given only on the good counts, to amend the verdict by the judge's notes of the trial; but Justice Buller said: "If there was *any* evidence which applied to the other

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bad or inconsistent counts—as, for instance, in an action for words, where some actionable words were laid and some not actionable, and evidence given of both sets of words and a general verdict—there the *postea* could not be amended, because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them.” (Eddows v. Hopkins, Doug. 376.) Under the old system of practice in this state, it was directed by the statute that “where there are several counts in a declaration, and entire damages are given, the verdict shall be good, notwithstanding one or more of such counts shall be defective;” but that provision can not help this verdict, because both causes of action, though one is defectively stated, were pleaded and tried together, and, as there was no separate assignment of the damages, and the court could not ascertain upon which cause the jury made the assessment, the motion in arrest should have been sustained. (Mooney v. Kennett, 19 Mo. 554.)

The other judges concurring, the judgment will be reversed and the cause remanded.



ROBERT & WIFE, Appellants, v. CASEY, Respondent.

1. The seventh section of the “act concerning minors, orphans and guardians,” approved February 8, 1825, (R. C. 1825, p. 417,) conferred upon the probate courts power to authorize guardians of minors to sell real estate of such minors at private sale to complete their education.
2. Upon petition of a guardian, under said act, to a probate court for leave to sell real estate of his ward, the court ordered, May 4, 1885, that the guardian, after an appraisal by three disinterested householders, should sell the lot at private sale for not less than three-fourths of its appraised value, and should make report of his proceedings at the next term of the court. After the next term of the court, the guardian made a private sale of the lot for more than the sum at which the lot had been appraised, and executed a deed, dated October 8, 1885, to the purchaser; but he made no report whatever to the court of the sale or of his proceedings under the order. *Held*, that the failure of the guardian to make report of the sale and proceedings under the order would not invalidate the title of the purchaser, the said act of February 8,

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1825, not requiring an approval of such sale by the probate court; nor would the fact, that the sale was made subsequent to the term at which the guardian was directed to report his proceedings under the order, invalidate the sale.

3. The original affidavit of the appraisers, and their written appraisement, and the deed of the guardian, though never reported to the court, are admissible in evidence to show the proceedings of the guardian under the order of the probate court.

Appeal from St. Louis Land Court.

The facts sufficiently appear in the opinion of the court.

Whittlesey, for appellants.

I. The records of the county court, and the approval by said court of the proceedings of the guardian under the order, are the only competent evidence to show that the order of court has been complied with, and parol testimony can not be resorted to until it is shown that record testimony has been lost. In courts of limited jurisdiction proceeding contrary to the course of the common law, the records are the proper evidence to show that the requisites of the law have been complied with. (Vallé v. Fleming, 19 Mo. 454; Medlin v. Pratte, 8 Mo. 235; Milan v. Pemberton, 12 Mo. 598; Danzey v. Swinney, 7 Texas, 617; Burnett v. Higgins, 4 Dana, 565, 567; Griffith v. Dicken, 4 Dana, 561; Planters' Bank v. Johnson, 7 Sm. & M. 449; 23 Mo. 30; 7 J. R. 19; 6 J. R. 9.)

II. The sale was void and the deed passed no title, because the court did not approve of the same, no return being made by the guardian as required by the order. It is admitted that, independent of statutes, sales made under orders of courts of general jurisdiction, if regular and made in proper time, pass the title, without any return under the order. But in this case the statute and the order of court both required that return and the approval of the sale when made. The county court was not a common law court, and had only limited as distinguished from general jurisdiction; it was a creature of statute entirely. At common law, the real estate of an infant can not be sold, nor will a court of chancery do

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it, although it may be for the benefit of the infant. (Calvert v. Godfrey, 6 Beav. 97; Garmston v. Gaunt, 9 Law Jurist, 78.) The authority of the county court and its process are regulated by the statute. An appeal lies from the judgment of the court confirming a sale by an administrator; (Speck v. Wohlien, 22 Mo. 810;) and appeals lie, in the cases of guardians and wards, as in other cases cognizable in the probate courts. If no report is necessary, and the court is not required to confirm that report to make the sale valid, and no report is made, how can an appeal be taken? But if the statute did not require this report, the county court justly exercised its powers in requiring the report, so that the proceedings might appear of record showing how the minor's title was divested; and what must appear of record may not be proved by parol. (See cases cited above; also Jenner v. Joliffe, 6 Johns. 9; Brush v. Taggart, 7 Johns. 19; 4 Dana, 565.) The court chose to retain authority over its own process, and to know whether the sale was for the benefit of the infant, who finds no record of a sale, and might well suppose that the power given by the order had not been executed.

III. The court had authority over its own process to order the report to be made at the next term; and as the sale was made after the process was returnable, the authority to sell had ceased, and the sale and deed were consequently void. The powers of the probate court were transferred to the county court by act of 1827. (See 2 Terr. Laws, p. 127.) By the acts of 1825, p. 272, § 13, the terms of the county courts were to be four in each year, and to be held on the first Mondays of February, May, August and November. The order in this case was made at the May term, 1835, and the report was returnable at the August term, and the sale was made in October (as appears from the deed), nearly two months after the return term of that order. The power had expired, and the sale under it was as void as a sheriff's levy and sale under an expired execution. (Vail v. Livingston, 4 Johns. 450; Devoe v. Elliot, 2 Caines, 143; Jarvis v. Russick, 12 Mo. 63, 67.)

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IV. If the power was good at the date of the sale in October, 1835, the deed was void because made in the name of the guardian, instead of his ward. (See authorities in notes to *Elwell v. Shaw*, 1 Am. L. Cas. 424; *Griswold v. Bigelow*, 6 Conn. 258; *Lockwood v. Sturdevant*, 6 Conn. 373, 387.)

— — — — —, for respondent.

I. It was contended in a written brief filed at a former term by Mr. Reber, (now judge of St. Louis Court of Common Pleas,) that the act of 1825 (R. C. 1825, p. 417) did not require the guardian to report his sale to the court; that if the court had the implied power to make such an order, a failure of the guardian to execute it could not defeat the title of an honest purchaser who had no control over him. The rule in such case is, where the law requires an act to be done in order to pass the title, there it must be performed or the sale is null. The law requires an administrator's sale to be approved by the court. (19 Mo. 461.) If not approved it is void. So also no title passes by an administrator's sale unless he execute a deed. (18 Mo. 561.) So also the sheriff's return is indispensable to the title of a tenant by elegit. (1 Barn. & Ald. 40.) But an irregularity, in a matter which is not an essential link in the chain of facts which pass title, does not vitiate in a collateral proceeding; as, for instance, a sheriff's failure to return his execution, where he has otherwise conformed to the law and executed a deed to the purchaser. And yet, where the sheriff's return *is the title* (as in the case of an elegit) there it must be shown. (See *Lessee of Stall v. McAlester*, 9 Ohio, 19; *Wheaton v. Sexton's Lessee*, 4 Wheat. 503; *Palmer v. Oakley*, 2 Dougl. 495.) In all the cases where a report of sale or confirmation is held necessary, it is on account of a statute. (*Young v. Keogh*, 11 Ill. 642; *Rea v. McCachron*, 13 Wend. 465; *Lessee of Curtis v. Norton*, 1 Ohio, 136; 17 Mo. 71, 442.) No confirmation of the sale is required either by the law or by the order under which the sale was made. The duty of the purchaser was performed when he paid the purchase money and re-

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ceived his deed. Every thing was regularly done up to that period. The land was sold for more than the appraised value; and the purchaser and those claiming under him have held under the sale for more than twenty years.

NAPTON, Judge, delivered the opinion of the court.

The title of the defendant in this case was derived from a sale by a guardian made in pursuance of an order of the county court of St. Louis county. The law under which the court acted is the seventh section of the act concerning minors, orphans and guardians in the revised code of 1825. (R. C. 1825, p. 417.) That section is as follows: "Sec. 7. Be it further enacted, that it shall be lawful for any guardian of any minor, who is committed to his or her care for tuition, and who has lands or tenements, for the purpose of education, to apply to the court of probate of the proper county for leave to sell the said lands or tenements, or such part thereof as may be necessary to complete the education of such minor, or to mortgage the same for any sum not less than two-thirds of the real value, as the court shall think proper." The remainder of the section, and some subsequent provisions, relate to the duties of the court and of the guardian concerning settlements of the guardian's accounts and the application of the money to the education of the minor. Nothing more is said in the act concerning the authority to sell or the manner in which the authority shall be executed.

The agreed case shows that the order for Turpin to sell the land of his daughter and ward was made at the May term of the county court; that the appraisement was made a few days after the date of the order; and that the deed was executed on the 3d of October of the same year. The objections to this title are, *first*, that the records of the court show no return whatever to the court by the guardian of any action by him under the order, and consequently the court never passed upon or sanctioned the sale, and no title vested until such approval; *secondly*, that the deed was made

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after the term of the court to which the guardian was directed to report, and that at this time his power and authority under the order had ceased ; and *thirdly*, that the affidavit and appraisement were improperly admitted in evidence.

We think the affidavit and appraisement were properly admitted. They were not matters of record, but proceedings *in pais*; and the principle that a court speaks only by its records is not applicable.

The act of 1825 does not expressly confer upon the county court the power to order a sale, but it does confer the power by necessary implication. There is in the act no restriction upon the kind of sale which the court may order—whether it shall be public or private ; nor does the law require that the sale shall be reported to the court or subject to its revision. The order of the court however in this case was, that the guardian should report his proceedings to the next term of the court. The order authorized the guardian to sell the lot at private sale, provided he would have it appraised by three disinterested householders, and could sell for two-thirds of its appraised value. He was then directed to report his proceedings to the court. No report was ever made ; nor do the records of the court show that after the order any thing was ever done in relation to this land, its sale, or the proceeds of the sale ; nor was any settlement ever made by the guardian, either in relation to this land or any other matter appertaining to his guardianship. It appears, however, from the affidavit and appraisement produced at the trial as original papers and proved, that the lot was appraised as directed by the court, and that the sale was made for about one hundred dollars more than the value at which it was appraised. The purchase money, it is agreed, was paid. The deed of the guardian recited the order of the court and the appraisement, and purported to convey the title of the minor in pursuance of the authority conferred by the order.

The question is whether the failure of the guardian to comply with the order of the court in making report of his sale invalidates the title of the purchaser. If the title of

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the purchaser depended on the approval and sanction of the court, there could of course be no title anterior to such approval. But here neither the law nor the order of the court makes the title depend upon the sanction of the court. The guardian is authorized to sell, and of course to convey, after he has procured an appraisement, and for a sum not less than a fixed proportion of its appraised value. *Then* he is directed to report his proceedings, not, it would seem, so much with any view that the court should exercise its judgment upon the policy or propriety of the sale generally, but principally to enable the court to pass upon the validity of his acts, so far as previous restraints had been imposed, and to control and direct a proper application of the proceeds. To hold the title of the purchaser dependent upon the return and report of the guardian, is to hold him responsible for a matter over which he has no control. He can look to the order of the court and see whether there is authority to sell, and if so, how far that authority is restricted; but when he sees an order and that the terms, upon which the power to sell depends, have been complied with, he is not responsible for the subsequent misconduct of the guardian. His title can not and ought not to be invalidated by matters happening subsequent to its vesting. We might as well require him to see to the application of the purchase money.

Undoubtedly where a title can not be consummated without certain acts being done and an approval by the court of those acts, the case is different. The sales of administrators under the statute are of this character. But no provision is made in the guardian law of 1825 to secure the supervision of the court over the sale; none which looks to an approval by the court as a preliminary to the purchaser's title.

The deed from the guardian is made in strict conformity to the order of the court, and it is not easy to see how it could have been executed in any other way than it was, in order to convey the title of the ward. It recites the terms of the power and their fulfilment, and purports to pass the interest of the ward by virtue of the power. The Connecticut

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cases, to which reference has been made in the argument, are not applicable. (6 Conn. 258; 6 Conn. 373.) In these cases, the administrators, on the face of their deeds, did not profess to convey the interest of the decedent, but their own; and the waranties were against their own acts. Nor is the doctrine concerning attorneys in fact, or the general law of principal and agent, in reference to conveyances, pertinent to the case of a guardian or administrator. (1 American Lea. Cas. 424.) The guardian does not act as agent of his ward, or under a power of attorney from him either express or implied, but he derives his power to sell and convey from the law and the action of the court under the law. If he followed this, and acts under this, his deed is binding upon the ward.

The remaining objection to be considered in this case is the one which denies to the guardian, after the term has lapsed at which he was directed to report, all authority or power to sell. It is said that when the August term of the county court of St. Louis had passed, the authority conferred by the order in May was gone, and the case is likened to a writ which an officer undertakes to execute after the return day has passed. Writs are issued by a clerk at the instance of a party, and their form and time of return are regulated by law. After the return day the writ is but blank paper, and the officer who acts under it is a mere trespasser. In this case the order of the court can not be construed as intending to limit the period within which a sale could be made. It authorizes a private sale, and the only restriction in the order to this authority is, that the lot shall be appraised and the sale shall not be made at a price below two-thirds of its appraised value. It does not in terms declare at what time the sale may be thus made, nor does it appear to be reasonably inferable from its language that there was on the part of the court any intention to compel the guardian to sell immediately or within any given period. He is directed to return his proceedings under the order to the next term; but this would only appear to be a direction that, so soon as a sale

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was made, the proceedings should be placed before the court at the first term after such sale. If no sale was made there was nothing to return; and it would hardly have been contended in this case, that if, after the sale in October, the guardian had duly returned a statement of the same, and the sale had been approved and confirmed, the sale would nevertheless have been void because made after the lapse of the first term succeeding the one at which the order was made. The truth is, it does not very clearly appear how the title of the purchaser could have been affected by any action of the court subsequent to the sale, had all the proceedings, as they ought, been properly returned. The order was strictly pursued. The sale was made on the terms directed. What authority had the court to set it aside, if they so desired, and what control could they exercise over it? The act gives them none. They had reserved none in the original order; and it would seem that the only purpose to be accomplished, or that could be attained, by requiring a return, was to enable the court to see that their direction had been followed, and to make such disposition of the purchase money as would forward the objects for which the sale was made. So far as the purchaser is concerned, who had a deed executed after every preliminary step which the law or the order of the court required, it was a matter of perfect indifference whether the guardian complied with his duty in returning the proceedings into court or not. His title was the same with or without a return.

We do not wish to be understood as saying that such an order as the county court made in this case would warrant a guardian at any remote period of time to undertake its execution. Cases might be put in which the lapse of time would be very material, but it is plain that five or six months is no reasonable period for effecting a private sale of land, and that the real injury which the minor has in this case sustained does not arise from the time when the order was executed, but from an entire failure to report its execution, or to account for the money which the sale produced. Whilst

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it is to be regretted that such power should ever be confided to a court in such a loose and unconditional manner, or that it should ever be delegated to a guardian in the same unrestricted mode, and whilst it is also probable that the power, thus entrusted by the court in this instance to the guardian, has been grossly abused, we are not, from these considerations, at liberty to annul the title of an honest purchaser acquired more than twenty years ago, based upon the performance of every act on his part, and on that of the guardian, which by law was made a pre-requisite to its validity.

The judgment is affirmed, the other judges concurring.

INHABITANTS OF PALMYRA, Defendants in Error, v. MORTON,
Plaintiff in Error.

25	593
97	548
25	593
110	380
25	593
131	23
25	593
72a	275

25	593
101a	102

1. The trustees of the town of Palmyra had power, under the tenth section of the act incorporating said town, (Local Acts, 1845, p. 151,)—if the owner or occupier of lots adjacent to the streets of said town should fail to pave the same as directed by the ordinances—to pave the same and recover the full expense thereof from such owner or occupier. The charter, authorizing such assessments, is in conformity to the constitution.
2. Such a suit is properly brought in the name of the corporation.
3. A member of a municipal corporation will be presumed to be aware of its by-laws and ordinances.

Error to Marion Circuit Court.

Lipscomb and Lackland, for plaintiff in error.

- I. The trustees had no right by authority of law to require Morton to curb and pave the streets in front of his property. The street is public property, a matter of public concern, and can therefore be made only by a general tax imposed upon the citizens and proprietors in proportion to the value of their property. The proceedings against Morton, if sustained, would be the imposition of a special and partial tax upon one individual for a public benefit; or, in other words, the taking of private property for public use without just com-

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pensation. The legislature has no power to do this, and could confer no such power upon the trustees of the town of Palmyra.

II. Morton was never requested to pave and curb. The ordinance can not be construed into a requisition upon Morton. The notice in the Palmyra Whig is not a sufficient notice to Morton.

III. There is nothing in the record showing that the trustees of Palmyra ever paid out money for which this suit is brought.

IV. This suit should have been brought by the trustees, and not by the inhabitants as appears by the record.

McCabe and Dryden, for defendant in error.

RICHARDSON, Judge, delivered the opinion of the court.

The plaintiffs were incorporated a body politic by an act of the general assembly, approved March 3d, 1845, (Sess. Acts, 1845, p. 152,) by the name of "The Inhabitants of the Town of Palmyra," and by that name were authorized to sue and be sued. The corporate powers of the town were vested in a board of trustees, to consist of five members to be chosen by the qualified voters of the town, who were authorized by the tenth section "to have the footways and side-walks of the streets paved at the expense of the owners or occupiers of the adjacent lots; and if such owner or occupier fail to pave the same as directed by ordinances, said trustees shall pave the same and recover the full expense thereof from such owner or occupier, before any court of competent jurisdiction, by action of debt." On the 3d of May, 1853, an ordinance was passed by the trustees, requiring the owners or occupiers of property fronting on Main street, from Church to Jefferson street, to curb and pave the same—the curbing to be of rock not less than three inches thick, and the paving to be of the width of eleven feet, and to be completed on or before the first day of September following. The defendant failed to have the paving and curbing done in front of his property;

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and in October, 1853, it was done by order of the trustees, for the expenses of which this suit was brought. On the trial only two instructions were asked, which were refused. They are as follows: "1. That unless the jury believe from the evidence that the defendant requested the plaintiffs to curb and pave in front of the lots in question, or to have said curbing and paving done, they will find for the defendant. 2. That unless they believe from the testimony that the money, alleged to have been paid by the plaintiffs for curbing and paving in front of said lots, was so paid by plaintiff at defendant's request, they will find for defendant." The verdict was for the plaintiffs; after which the defendant moved for a new trial, and in arrest of judgment; but the motions were overruled.

The main objection taken by defendant, which arises on the motion in arrest, is that the street is public property and can only be improved at the general expense; that this proceeding is an attempt to levy a special tax upon one individual for a public benefit, and is obnoxious to the constitutional provision which declares that private property shall not be taken for public use without just compensation. It may be observed in the first place, that there is no attempt here to exercise the right of eminent domain; for it was not proposed to condemn the defendant's property to public use, and it is unnecessary to discuss the character, extent or limitation of that power. Though the public convenience was promoted by making pavement on the street designated in the ordinance, yet it was essentially a local improvement, and it was proper that the owner or occupant of the property fronting on it should bear the burden of its cost. (*Lockwood v. The City of St. Louis*, 24 Mo. 20.) Examples of local assessments for partial improvements are familiar in the legislation of states and municipal corporations. The subject has been thoroughly discussed, and every principle bearing on it severely analyzed, in almost every state of the Union where the power has been exercised; and it is now as firmly established as any other doctrine of American law. Each county builds

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its own jails and court-house, erects bridges and opens roads ; and the expenses for such purposes are defrayed by levying a county tax. Public roads are worked and kept in repair by the inhabitants of particular districts ; school houses are built at the expense of school districts ; marshes are drained and river banks are leveed, and the expenses of these improvements are charged upon the persons in the vicinity, although the public is benefited by them. So, in towns, wells and cisterns are dug and kept in repair at the expense of particular limits ; and in cities public parks and wharves are established, streets are opened and paved, sewers are made, water-pipes are laid, and the expenses thereof are charged to the property holders immediately benefited thereby. It is the exercise of the same power that authorizes districts, counties or towns to subscribe for public improvements. (27 Miss. 224 ; 5 Gilm. 405 ; 1 McCook, 77 ; 9 Ben. Monr. 526 ; 9 Humph. 252 ; 4 Comst. 423.)

The right of a municipal corporation to require the owner to pave the side-walk in front of his property may be derived from its duty to protect the public health and to prevent nuisances, and is a mere police regulation. It is the exertion of the same power that prohibits persons from throwing filth into the streets, or from obstructing the side-walks ; that regulates awnings ; that forbids the building of wooden houses within certain districts ; that prescribes the quantity of powder which may be kept in stores, and that requires the pavements in front of each house to be kept clear of ice and snow.

The suit was properly brought in the name of the corporation. It was the duty of the trustees under the charter to have the side-walks paved, if the owner failed to do it in the time appointed ; but they are merely the agents of the corporation in that behalf, and had no cause of action for which they could sue, any more than a cause of action would have accrued, for a like service, to the constable, marshal, engineer, street commissioner, or any other officer or agent whose duty it was to superintend the work. (Northern Liberties v.

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St. John's Church, 13 Penn. State, 104.) In this case the board of commissioners were authorized to recover the assessments, for grading and paving a street, made on the owners of property that fronted the street ; yet the action was maintained in the name of the corporation.

The instructions asked by defendant were properly refused, for they sought to place the right of recovery on grounds that would paralyze the tenth section of the charter. The plaintiffs could recover, on a familiar principle of the common law, if they had caused the work to be done and paid for it at the defendant's request ; but they have authority to cause the side-walks of a street to be paved at the expense of the owners or occupiers of property fronting on it, with or without their consent, and express power is given to recover "the full expense thereof from such owner or occupier," without the condition of having first paid the same.

There is nothing in the objection that the defendant was not notified of the ordinance ; for being a member of the corporation, he is presumed to be aware of its by-laws. (City of London v. Venacie, 12 Mod. 269 ; Glover on Corporations, 290, 207.) The other judges concurring, the judgment will be affirmed.



WOOLFOLK, Respondent, v. TATE, Appellant.

1. Where, during the pending of a motion for a new trial on the ground that the verdict is against the weight of evidence, a cause is removed to another circuit by an act of the legislature transferring the county in which the suit is pending to such other circuit, the judge of such other circuit should not decline disturbing the verdict, and refuse to grant a new trial, on the ground that the judge, not having heard the evidence as delivered by the witnesses on the stand, had not had the opportunity which the jury had of deciding upon the credibility of the witnesses. If embarrassed from such cause, the court should grant a new trial.

25	597
48a	317
25	597
113	45
25	597
56a	49
25	597
c139	117
25	597
142	368
25	597
148	78
78a	353
25	597
152	266
25	597
102a	696
25	597
97a	688

Appeal from Marion Circuit Court.

Lipscomb, for appellant.

I. It is the doctrine of this court that motions for new trials are always addressed to the discretion of the court in which

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the trial was had. (16 Mo. 393.) But it is submitted that this court is not in this case called upon to control the discretion of the circuit court as to the weight of testimony. That court expressly declined acting upon the question because the judge then sitting was not the judge before whom the cause was tried.

II. The verdict was against the evidence.

T. L. and R. E. Anderson, for respondent.

I. The judge of the circuit court properly refused to disturb the verdict. The presumptions of law are in favor of the verdict.

RICHARDSON, Judge, delivered the opinion of the court.

This case was tried in the Marion circuit court, at the July term, 1855, before Judge Wells. The verdict was for the plaintiff, and thereupon the defendant filed his motion for a new trial, on the ground that the verdict was against the weight of evidence, and that the court admitted illegal testimony. The motion was not heard by the judge who tried the cause, but was continued until the next term, and in the mean time Marion county, by an act of the general assembly, was included in another circuit, in which Judge Redd presided. At the February term, 1856, the motion was called and overruled for the reason, as assigned by the court, "that the cause having been tried before Judge Wells, and not having heard the evidence as delivered by the witnesses on the stand, and not having the opportunity which the jury had of deciding upon the credibility of the witnesses, by the manner in which that evidence was given, the court is unwilling to disturb the verdict on the ground that it is against the weight of evidence." Without expressing any opinion whatever on the evidence or the merits of the motion, we think that, under the circumstances, the court ought to have sustained the motion and ordered a new trial. A party to a suit has the same right to have his motion for a new trial heard and duly considered as he has to institute or defend an action.

Wibbing v. Powers.

An acknowledged ground for granting new trials is, that a verdict is against the weight of evidence; and if, in this case, the court was embarrassed by the circumstances, and could not pass on the merits of the motion, it ought to have directed a new trial. It is better to allow a new trial, where the court for any cause can not consider the merits of an application for that purpose, than to refuse it; for by denying the motion, without giving a party the benefit of being heard or of having his reasons considered, irreparable injury may be done, while on the other hand the prevailing party in the verdict will only suffer by delay, and generally will secure another verdict if he is entitled to it.

With the concurrence of the other judges, the judgment is reversed and the cause remanded.

WIBBING, Respondent, v. POWERS, Appellant.

1. A material man instituted proceedings by *scire facias*, under section 8 of the "act for securing liens to mechanics and others," (R. C. 1845, p. 785,) to enforce a lien; the original debtor—the contractor—and the owner of the building were made parties to the proceeding; the plaintiff dismissed the proceeding as to the debtor; *held* that, having dismissed the proceeding as to the debtor, there was no party on the record to defend the suit, and the cause could not proceed against the owner of the building alone.
2. The general mechanics' lien law of 1845 was in force in St. Louis county as far as it was not inconsistent with the local act of 1848.

25a	599
33a	212
25	599
42a	262
25	599
45a	223
25	599
49a	97
25	599
129	179
59a	29
25	599
62a	574

Appeal from St. Louis Land Court.

A. J. P. Garesché, for appellant.

H. N. Hart, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was a proceeding by *scire facias* to enforce a mechanic's lien under the 8th section of the "act for securing liens to mechanics and others." (R. C. 1845, p. 733.) Before issuing the *scire facias* there had been no judgment against the contractor for the labor and materials furnished. On motion

Wibbing v. Powers.

of the plaintiff, the cause was dismissed as to the defendant Eckert, the contractor, and a judgment was taken against Powers only, the owner of the building.

It is clear that this proceeding can not be sustained. As the plaintiff discontinued as to the debtor, there was no party to the record who could defend the suit. It is no answer to this objection that Eckert could not be found. The statute provided a mode of service in such an event. (Sec. 9.) Powers, the owner, was not brought into court to defend the cause of action against Eckert, the contractor. He is not presumed to know any thing more in relation to the demand against the contractor than any other person. The object of calling in the owner of the building is to give him an opportunity to show why his property should not be condemned to pay the debt of another. The contractor is the only person who can contest the validity of the demand; and, as the proceeding was dismissed as to him, there was no person to defend the claim of the plaintiff. This case is as if a creditor, proceeding by attachment and garnishment, should dismiss his suit against the defendant—the debtor—and afterwards take steps against the garnishee, when there could be no judgment which he could be condemned to satisfy.

In the case of Schulemberg v. Gibson, 15 Mo. 287, it was held that the general law in relation to mechanics' liens still regulates the remedy, and continues in full force in the county of St. Louis, in all its provisions not inconsistent with the special law. The other judges concurring, the judgment will be reversed and the cause remanded.

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A

ABATEMENT.

See PRACTICE, 7.

1. A failure to make all the representatives of a deceased plaintiff and a deceased defendant parties to the suit on or before the third term after the suggestion of the deaths, will cause the suit to abate only as to those representatives not brought in and made parties; it is error to order the suit to abate entirely. *Farrell's Adm'r v. Brennan's Adm'r*, 88.

ACCEPTANCE OF UNITED STATES SURVEY.

See LANDS AND LAND TITLES.

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See JOINDER OF ACTIONS. SLANDER.

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See GUARDIANS' SALES.

1. The probate court of Ray county has jurisdiction to entertain a motion for an order directing an executor to pay specific legacies. (Sess. Acts, 1868, p. 390.) *Darneal v. Reeves' Exec'r*, 295.
2. The widow of a testator is a competent witness, in a suit upon the bond of the executor of the will of such testator, to prove the receipt by the executor of money belonging to the estate that had not been inventoried or accounted for. *Sherwood's Adm'r v. Hill*, 391.
3. The bond required by law of an executor is broken if he fail to make a complete and perfect inventory of the estate of his testator; his securities will be liable for a failure on his part to inventory and account for money of the testator received by him after the death of the testator and before the granting of the letters testamentary. *Ib.*

ADULTERY.

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ADVERSE POSSESSION.

See LIMITATION.

AFFIDAVIT.

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1. An agreement guarantying the performance of a contract previously entered into with another, though in writing, must have a consideration to be valid and binding. *Pfeiffer v. Kingsland*, 66.
2. To constitute an enforceable contract it must be founded on a valuable consideration, and be certain and definite in its terms. *Wesson v. Horner*, 81.

AFFIDAVIT.

See **CONTINUANCE. LANDLORD AND TENANT.**

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See **HUSBAND AND WIFE.**

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1. A writ of error will lie to the decision of a circuit court in a proceeding under section 81 of the act concerning wills to set aside a will (R. C. 1845, p. 1088); the thirty-second section of said act does not confine the remedy of a party aggrieved to an appeal. *Farrell's Adm'r v. Brennan's Adm'r*, 88.
2. A proceeding instituted in a circuit court in behalf of the North Missouri Railroad Company, under its charter, to obtain a condemnation of land upon which it had located its railroad, is a proceeding in which the court acts in its judicial capacity; an appeal will lie to the Supreme Court from the final judgment of the circuit court in such proceeding. *North Missouri Railroad Co. v. Lackland*, 515.
3. To authorize an appeal to the Supreme Court, final judgment should have been rendered in the court from whose decision the appeal is taken. *The State v. Shehane*, 565.

APPEARANCE.

1. The fact that the defendant, A. B., when the cause was called for trial and he was called into court, appeared and objected to the court's proceeding with the cause on the ground that he had not been served with process as required by law, is not such an appearance as would make a judgment by default against him regular. *Smith's Adm'r v. Rollins*, 408.

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1. The fact that an express company, receiving goods from a vendor to be transported and delivered to a vendee upon the payment of the price, renders itself liable to respond to the vendor for the price in consequence of its delivering the goods to the vendee without the payment of the price, will not entitle it to sue the vendee by attachment under subdivision 18 of section 1 of the attachment act. (R. C. 1855, p. 239.)
Richardson's Missouri Express Co. v. Cunningham, 396.

AUTHENTICATION.

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See **CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES.**

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See **PRACTICE**, 14, 15, 88.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. It is a good defence to an action on a promissory note that it was given to the plaintiff in furtherance of an attempt on his part to defraud his creditors. *Hamilton v. Scull's Adm'r*, 165.
2. Where a negotiable promissory note is drawn in favor of a married woman, she may, with the assent of her husband, legally transfer the same by an endorsement in her own name. *McLain v. Weidemeyer*, 384.
3. This assent is sufficiently shown if it appear that the note, so endorsed by her in her own name, was executed in her favor in consideration of the transfer by her to the maker thereof of a bill of exchange transmitted to her by her husband, absent in California. *Ib.*
4. To constitute a valid transfer by the payee of a negotiable promissory note, it is not necessary that the assignment be by endorsement; a deed of assignment for the benefit of creditors purporting to assign the same is sufficient: such an assignee may maintain an action upon the note in his own name. *Ib.*
5. Though a promissory note given by way of compromise of a doubtful right is valid and binding, it is a good defence that it was obtained through a fraudulent suppression of the truth. *Stephens v. Spiers*, 386.
6. An instrument in the following form—"I promise to pay G. W. Crow one hundred dollars if the M. T. Lewis county road is not opened and kept open along the creek where it is now located, or if said Crow should make null the present proceedings of the court and commission-

BILLS OF EXCHANGE AND PROMISSORY NOTES—(Continued.)

ers as already had and done by them. I also agree that if said road is opened and kept open that said Crow shall have all the damages that may ever be assessed me for the same. February 7, 1855. [Signed] Jacob Harmon"—is within section 1 of the act concerning bonds and notes, (R. C. 1845, p. 189,) and imports a consideration; it is not chameleonic on its face. *Crow v. Harmon*, 417.

7. Where the payee of a negotiable promissory note assigns the same, not for value, but fraudulently, with a view to prevent the maker from setting up by way of set-off a demand against the payee, the maker may in a suit against him by such assignee or endorser, plead the fraudulent assignment, and set-off such demand. *Martindale v. Hudson*, 422.

BOATS AND VESSELS.

1. The custom or usage authorizing those engaged in the transportation of merchandise to advance to forwarding agents the existing charges thereon, and to hold the consignees and owners liable therefor, does not extend to or cover advances made on demands upon the consignees or owners wholly foreign to, and disconnected with, any cost or charge for transportation. *Steamboat Virginia v. Kraft*, 76.
2. A master of a vessel, as such, has power to bind the owners for necessities and repairs only: the burden of proving the necessity lies upon the creditor. *Clark v. Humphreys*, 99.
3. A custom or usage of trade, to be valid and binding, must be reasonable. *Ib.*
4. A custom or usage among masters and clerks of steamboats for the master to draw bills of exchange upon the clerk, and negotiate the same, is an unreasonable custom and can not be invoked to fix a liability upon the owners to the parties to whom such bills of exchange may be transferred. *Ib.*

BONA FIDE PURCHASER.

1. To constitute a person a *bona fide* purchaser for value without notice within the rule that protects such a purchaser the purchase money should be paid before notice is received. *Paul v. Fulton*, 156.

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See EXECUTOR'S BOND.

BY-LAWS.

See CORPORATION.

C

CARONDELET COMMON.

See LANDS AND LAND TITLES.

CERTIFICATE.

See JUSTICES' COURTS, 3.

CESTUI QUE TRUST.

See TRUST.

CHANGE OF VENUE.

1. Where a petition of a defendant in a criminal prosecution for a change of venue sets forth one of the statutory grounds for such change, the order removing the cause will not be rendered null and void by reason of an omission to specify therein the cause of removal. *State v. Worrall*, 205.
2. Where two are jointly indicted, and one only applies for a change of venue, an order removing the cause will be effectual only as to the one so applying; if a recognizance be in such case entered into by both to appear in the court to which the cause is removed, it will be void as to the one not applying for a change of venue. *The State v. Wetherford*, 489.

CHARTER.

See **ST. LOUIS. FAYETTE. PALMYRA. CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES.**

1. The act incorporating the city of Fayette confers upon the mayor thereof of the same jurisdiction, in cases arising in said city, that justices of the peace have in their respective townships; (Sess. Acts, 1855, Adj. Sess. p. 212, sec. 11;) he can not entertain jurisdiction of an action for a penalty exceeding ninety dollars imposed by an ordinance of said city. *City of Fayette v. Shafroth*, 445.
2. The fact that the directors of an incorporated company may have violated the provisions of the charter of the company will not release a subscriber to the stock of the company from his liability to pay calls made upon his subscription of stock. *Hannibal, Ralls County and Paris Plank Road Co. v. Menefee*, 547.

CHOSE IN ACTION.

1. If personal property, other than choses in action, be in such a situation that the husband may, if he will, lawfully take it into his hands at any moment, this is a sufficient reduction into possession, although he should not actually take it into his custody. *Walker's Adm'r v. Walker*, 367.
2. Where a husband is in possession of personal property bequeathed to his wife by a former husband, as administrator of such former husband, and he makes a final settlement, and it is ordered by the court that he and his wife retain all the estate of the deceased in their hands: *held*, that the husband's possession as administrator ceases, and his possession *jure mariti* commences, at the date of such order; this would not however be a reduction into possession by him of a bond or note for the wife's money taken by him as administrator. *Ib.*

CITY OF FAYETTE.

See **FAYETTE.**

CITY ORDINANCES.

See **PALMYRA.**

CITY OF PALMYRA.

See **PALMYRA.**

CITY OF ST. LOUIS.

See **ST. LOUIS.**

CONDEMNATION AND APPROPRIATION TO PUBLIC USES.

1. The state, by virtue of its eminent domain, has the right to take private property for public use. *Newby v. Platte County*, 258.
2. The state can rightfully exercise this right only in cases of public necessity, and then only upon paying the owner a just compensation. *Ib.*
3. It is competent for the legislature to provide that, in determining the just compensation to which the owner of property appropriated to public use is entitled under the constitution, the benefits and advantages accruing to such owner in respect of the residue of his property unappropriated, in consequence of the use to which the part taken is applied, shall be taken into consideration. (SCOTT, J., dissenting.) *Ib.*
4. This right of providing that benefits and advantages shall be taken in consideration in determining the just compensation required by the constitution is based upon the general taxing power. *Ib.*
5. Such a provision is in effect an assessment or tax on benefits; being such, and not a tax on property, properly speaking, it is not in conflict with the provision of the constitution requiring that all property subject to taxation shall be taxed in proportion to its value. *Ib.*
6. The seventeenth section of article 2 of the general act of 1845, "for opening and repairing public roads and highways, (R. C. 1845, p. 974,) providing that in assessing the damages sustained by a person by reason of a road's passing over his land "the commissioners shall take into consideration the advantages as well as the disadvantages of the road to such person," is in harmony with the constitution. *Ib.*
7. The benefits to be charged against to adjacent land owners are, it seems, the direct and peculiar benefits resulting to them in particular, and not the general benefit accruing to them in common with other land owners from the building of the road. *Ib.*
8. The building of a railroad by a private corporation, under the authority of the legislature, for the accommodation of the public, is a public use for which private property may be lawfully taken. *Walther v. Warner*, 277.
9. Legislative acts authorizing the taking of private property for public use are unconstitutional unless they provide the owner with a proper remedy to obtain a just compensation. *Ib.*
10. This remedy must be an efficient one; there must be an adequate fund, and an appropriate legal remedy to enforce its application; a judgment against a private corporation is not sufficient. *Ib.*
11. In proceedings instituted by the Pacific Railroad Company to obtain title to land upon which said company had located its railroad, a judgment was rendered against the company for the damages assessed, and an order was made transferring the title to the land to the company; held, that actual payment of the damages was essential to the vesting of the title in the company; no entry upon said land prior to such payment for the purpose of constructing the railroad could be justified. *Ib.*
12. It is competent, it seems, for the legislature to authorize entries upon private property without compensation for the purpose of making examinations and surveys preliminary to the location of a railroad. *Ib.*

CONDEMNATION & APPROPRIATION TO PUBLIC USES—(*Cont'd.*)

13. The second section of the act of February 28, 1858, amendatory of the charter of St. Louis of March 8, 1851, is constitutional in so far as it required that in paying the value of land taken for the opening, widening or altering of a lane, alley, street, &c., the city should pay the value to the public generally of the proposed improvement, and that the balance should be assessed "against the owner or owners of the property fronting on such lane, alley, street, avenue, wharf or square, and in the blocks next adjacent, on either side or end thereof, according to the value of the property so assessed and in the proportion that the owners thereof may be respectively benefited by the proposed improvement." *Garrett v. City of St. Louis*, 505.
14. Such assessments against adjacent owners in respect of the benefits received by them from the opening, widening or altering a street, &c., are a constitutional exercise of the taxing power. *Ib.*
15. A proceeding instituted in a circuit court in behalf of the North Missouri Railroad Company, under its charter, to obtain a condemnation of land upon which it had located its railroad, is a proceeding in which the court acts in its judicial capacity; an appeal will lie to the Supreme Court from the final judgment of the circuit court in such proceeding. *North Missouri Railroad Co. v. Lackland*, 515. *North Missouri Railroad Co. v. Reynal*, 584.
16. *Quere*: Whether it would be competent for the legislature, in providing a mode for the condemnation and appropriation of private property to public uses, to make the judgment of a special tribunal final, and thus place the matter beyond the control of the courts. *Ib.*
17. The North Missouri Railroad Company instituted proceedings under its charter to obtain a condemnation of land upon which its railroad was located; *held*, that said company might, at any time before final judgment in such proceeding, change the route of the railroad and dismiss the proceeding. *Ib.*
18. The eighth section of the "act to authorize the formation of associations to construct plank roads and macadamized roads," approved February 27, 1851, (Sess. Acts, 1851, p. 259,) is in conformity to the constitution in so far as it authorizes the jury, appointed to assess the damages received by the land owner, to take into consideration the "advantages of said road to said owner." *Louisiana & Frankford Plank Road Co. v. Pickett*, 535.
19. The "advantages" which may be taken into consideration in determining the "just compensation" to which the land owner is entitled, are the direct and peculiar benefits or advantages accruing to him in particular in respect of the residue of his land unappropriated, and not any general benefit or increase of value received by such land in common with other lands in the neighborhood. *Ib.*
20. The provision contained in the eighth section of the "act to authorize the formation of associations to construct plank roads and macadamized roads, (Sess. Acts, 1851, p. 259,) authorizing the appointment of a "jury of five disinterested land owners of the county to assess the dam

CONDEMNATION & APPROPRIATION TO PUBLIC USES—(*Cont'd.*)

- ages," &c., is in conformity with the constitution ; they do not perform the proper and usual functions of a *jury* in civil or criminal cases. *Ib.*
21. In a petition in behalf of the North Missouri Railroad Company for the condemnation of the land upon which its railroad was located, it was alleged that the road passed hills and valleys, and that a strip of one hundred and fifty feet in width was necessary for the construction of the road ; *held*, that this allegation was not traversable. *North Missouri Railroad Co. v. Gott*, 540.
 22. In a proceeding, instituted in behalf of the North Missouri Railroad Company to condemn land, *three* commissioners or viewers were, in accordance with prayer of the petition, appointed to assess the damages ; *held*—it not appearing that said company had accepted the provisions of the general railroad law of February 24, 1853, (Sess. Acts, 1853, p. 128,) requiring the appointment of *five* commissioners, &c.—that the proceeding was properly conducted under the act of incorporation of March 3, 1851. (Sess. Acts, 1851, p. 488.) *Ib.*
 23. The benefits that may be charged, under section 9 of the act incorporating the Pacific Railroad (Sess. Acts, 1849, p. 219), against land owners adjacent to said road—portions of whose lands may be taken and appropriated to public use—and deducted from the value of the land taken, in estimating the "just compensation" to which such land owners are entitled, are the direct and peculiar benefits resulting to them in particular, and not the general benefits or advantages they, in common with other land owners in the vicinity, derive from the use to which the portions taken are appropriated. *Pacific Railroad v. Chrystal*, 544.
 24. The "value"—in the sense of the ninth section of said act—of the land taken is its value independent of the location of the railroad ; and the "disadvantages," that may be taken into consideration, are the injuries resulting to the land owner, in respect of the residue of the tract unappropriated, from the particular mode in which part thereof is taken, or the use to which it is applied. *Ib.*

COMMON.

See LANDS AND LAND TITLES.

COMPETENCY.

See WITNESS.

CONFESSiON OF JUDGMENT.

See JUSTICES' COURTS, 5, 6.

CONSIDERATION.

See AGREEMENT, 1, 2. BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.

CONSTABLE.

See SCHOOL TAX.

CONSTITUTIONAL LAW.

See CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES.

1. The state, by virtue of its eminent domain, has the right to take private property for public use. *Newby v. Platte County*, 258.

CONSTITUTIONAL LAW—(*Continued.*)

2. The state can rightfully exercise this right only in cases of public necessity, and then only upon paying the owner a just compensation. *Ib.*
3. It is competent for the legislature to provide that, in determining the just compensation to which the owner of property appropriated to public use is entitled under the constitution, the benefits and advantages accruing to such owner in respect of the residue of his property unappropriated, in consequence of the use to which the part taken is applied, shall be taken into consideration. (*Scott, J., dissenting.*) *Ib.*
4. This right of providing that benefits and advantages shall be taken into consideration in determining the just compensation required by the constitution is based upon the general taxing power. *Ib.*
5. Such a provision is in effect an assessment or tax on benefits; being such, and not a tax on property, properly speaking, it is not in conflict with the provision of the constitution requiring that all property subject to taxation shall be taxed in proportion to its value. *Ib.*
6. The seventeenth section of article 2 of the general act of 1845, "for opening and repairing public roads and highways," (R. C. 1845, p. 974,) providing that in assessing the damages sustained by a person by reason of a road's passing over his land "the commissioners shall take into consideration the advantages as well as the disadvantages of the road to such person" is in harmony with the constitution. *Ib.*
7. The building of a railroad by a private corporation, under the authority of the legislature, for the accommodation of the public, is a public use for which private property may be lawfully taken. *Walther v. Warner*, 277.
8. Legislative acts authorizing the taking of private property for public use are unconstitutional unless they provide the owner with a proper remedy to obtain a just compensation. *Ib.*
9. This remedy must be an efficient one; there must be an adequate fund, and an appropriate legal remedy to enforce its application; a judgment against a private corporation is not sufficient. *Ib.*
10. In proceedings instituted by the Pacific Railroad Company to obtain title to land upon which said company had located its railroad, a judgment was rendered against the company for the damages assessed, and an order was made transferring the title to the land to the company; held, that actual payment of the damages was essential to the vesting of the title in the company; no entry upon said land prior to such payment for the purpose of constructing the railroad could be justified. *Ib.*
11. It is competent, it seems, for the legislature to authorize entries upon private property without compensation for the purpose of making examinations and surveys preliminary to the location of a railroad. *Ib.*
12. The pardoning power belongs exclusively to the executive department of the government and can not be exercised by the legislative department. *The State v. Stoss*, 291.
13. The "act to relieve certain persons from the penalties of an act entitled 'an act to regulate dram-shops,' approved December 18, 1855, (R. C. 1855, p. 682,)" approved February 12, 1857, (Sess. Acts, 1857, p. 60,) releasing all persons, then indicted for violations of the said act to regu-

CONSTITUTIONAL LAW—(*Continued.*)

- late dram-shops committed before December 15, 1856, from prosecution, provided each individual shall pay all the costs and a fee of two dollars to the circuit attorney—and declaring that whenever any person so indicted shall pay said costs and fee, it shall be the duty of the circuit judge to order said case to be dismissed—is unconstitutional, it being an attempted exercise of the pardoning power, and also an interference with the judicial department of the government. *Ib.*
14. The second section of the act of February 28, 1858, amendatory of the charter of St. Louis of March 8, 1851, is constitutional in so far as it required that in paying the value of land taken for the opening, widening or altering of a lane, alley, street, &c., the city should pay the value to the public generally of the proposed improvement, and that the balance should be assessed “against the owner or owners of the property fronting on such lane, alley, street, avenue, wharf or square, and in the blocks next adjacent, on either side or end thereof, according to the value of the property so assessed and in the proportion that the owners thereof may be respectively benefited by the proposed improvement.” *Garrett v. City of St. Louis*, 505.
 15. Such assessments against adjacent owners in respect of the benefits received by them from the opening, widening or altering a street, &c., are a constitutional exercise of the taxing power. *Ib.*
 16. *Quere*: Whether it would be competent for the legislature, in providing a mode for the condemnation and appropriation of private property to public uses, to make the judgment of a special tribunal final, and thus place the matter beyond the control of the courts. *North Missouri Railroad Co. v. Lackland*, 515. *North Missouri Railroad Co. v. Reynal*, 584.
 17. The eighth section of the “act to authorize the formation of associations to construct plank roads and macadamized roads,” approved February 27, 1851, (*Sess. Acts*, 1851, p. 259,) is in conformity to the constitution in so far as it authorizes the jury, appointed to assess the damages received by the land owner, to take into consideration the “advantages of said road to said owner.” *Louisiana and Frankford Plank Road Co. v. Pickett*, 585.
 18. The provision contained in the eighth section of the “act to authorize the formation of associations to construct plank roads and macadamized roads, (*Sess. Acts*, 1851, p. 259,) authorizing the appointment of a “jury of five disinterested land owners of the county to assess the damages,” &c., is in conformity with the constitution; they do not perform the proper and usual functions of a jury in civil or criminal cases. *Ib.*

CONSTRUCTION.

See EVIDENCE, 17, 18. FOREIGN LAW.

1. In determining the meaning of a written instrument, the acts of the parties thereto are entitled to great weight. *Patterson v. Camden*, 18.
2. Although, as a general rule, the interpretation of written instruments belongs to the court and not to the jury, the construction and true interpretation of commercial correspondence may, under proper circumstances, be properly left to the consideration of the jury. *Fagin v. Connolly*, 94.

CONSTRUCTION—(*Continued.*)

8. A failure to pay a nominal consideration can not be shown to defeat a deed. *Draper v. Shoot*, 197.

CONTINUANCE.

1. Where an affidavit for a continuance is filed, the court should not permit it to be strengthened by other affidavits of the same person. *The State v. Buckner*, 167.
2. Where a motion for a continuance on the ground of the absence of a material witness is overruled, the Supreme Court will not hold it to be error if it clearly appear that the testimony of the absent witness would not have affected the result. *The State v. Worrell*, 205.

CONVEYANCE.

See NOTICE. VENDOR AND PURCHASER. PATENT.

1. A patent to a fictitious person is a nullity. *Thomas v. Wyatt*, 24. *Thomas v. Boerner*, 27.
2. A failure to pay a nominal consideration can not be shown to defeat a deed. *Draper v. Shoot*, 197.
3. A deed was executed in the following form: "This indenture, made and entered into this, &c., by and between A. B. and C. D., of, &c., of the first part, and E. F., of, &c., of the second part, witnesseth, &c. In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day, &c. [Signed] G. H. (seal), I. J. (seal), attorneys for A. B. and C. D." Held, to be the deed of the principals, A. B. and C. D. *Martin v. Almond*, 818.

CORPORATION.

See CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES. CHARTER.

1. The fact that the directors of an incorporated company may have violated the provisions of the charter of the company will not release a subscriber to the stock of the company from his liability to pay calls made upon his subscription of stock. *Hannibal, Ralls County and Paris Plank Road Co. v. Menefee*, 547.
2. The trustees of the town of Palmyra had power, under the tenth section of the act incorporating said town, (Local Acts, 1845, p. 151,)—if the owner or occupier of lots adjacent to the streets of said town should fail to pave the same as directed by the ordinances—to pave the same and recover the full expense thereof from such owner or occupier. The charter, authorizing such assessments, is in conformity to the constitution. *Inhabitants of Palmyra v. Morton*, 592.
3. Such a suit is properly brought in the name of the corporation. *Ib.*
4. A member of a municipal corporation will be presumed to be aware of its by-laws and ordinances. *Ib.*

COSTS.

1. The provision contained in section 11 of article 2 of the act concerning costs, (R. C. 1855, p. 451,) that if the jury fail to declare, in the case of the acquittal of a person indicted, by whom the costs shall be paid—the

COSTS—(*Continued.*)

prosecutor or the county—the court shall render judgment against the prosecutor for costs, is not applicable to cases in which persons had become prosecutors under the revised code of 1845. Where the indictment, with the prosecutor's name endorsed, was pending previous to the taking effect of the revised code of 1855, the tenth section of article 2 of the act concerning costs in the revised code of 1845 (R. C. 1845, p. 249) is applicable. *The State v. Berry*, 355.

2. The state is liable to pay costs in a criminal prosecution against a slave only in case the slave is convicted of a capital offence and is executed; an escape of the slave from custody or his execution by a mob, either before or after conviction, would not be sufficient to render the state liable for costs. *Calhoun v. Buffington*, 443.
3. Where a railroad company, after having commenced proceedings for the condemnation of land upon which its railroad is located, exercises its right of dismissing the proceedings before the judgment of the court upon the report of the viewers or commissioners is rendered, the company should pay the costs and expenses growing out of the suit. *North Missouri Railroad Co. v. Reynal*, 534. *Ib. v. Lackland*, 515.

COUNTER CLAIM.

See PLEADING.

COURT.

See CONSTRUCTION, 2. EVIDENCE, 17. APPEAL, 2. PROBATE COURT.

CREDITORS.

See FRAUD AND FRAUDULENT CONVEYANCES, 2.

CRIMES AND PUNISHMENTS.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

1. A jury, in the case of an indictment for murder, were instructed as follows: "If you have a reasonable doubt of defendant's guilt, you should acquit; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching defendant's guilt, and not a mere possibility of his innocence;" held, that the instruction was good. *The State v. Nueslein*, 111.
2. To constitute murder in the first degree, it is not necessary that the fatal stroke be given with the specific intent to kill; it is sufficient if it be given wilfully and maliciously, and with the intent to inflict great bodily harm. *Ib.*
3. Whether a weapon used, a stick or club, is of a character likely to produce death or great bodily harm is a question of fact to be passed upon by the jury. *Ib.*
4. S., a cripple, deformed from infancy, was indicted for murder; held, that evidence was inadmissible in his behalf to show that by reason of his weak and crippled condition of body he was rendered nervous and peculiarly sensitive to fear from external violence. *The State v. Shoultz*, 128.
5. Where one wilfully shoots and kills another in malice, it is murder in the first degree, and not murder in the second degree. *Ib.*

CRIMES AND PUNISHMENTS—(*Continued.*)

6. In the case of an indictment for adultery, the declarations and admissions of the defendant are competent evidence to prove that he was a married man at the time of the alleged adultery. *The State v. McDonald*, 176.
7. An indictment charging a sale by defendant of intoxicating liquors "without his then and there having a dram-shop keeper's license, inn-keeper's license, or any other legal authority to sell said intoxicating liquor at said place, in manner and form aforesaid, contrary," &c., sufficiently charges a want of authority to sell. *The State v. Sutton*, 300.
8. The utterance in public of words grossly obscene, in such a manner as to outrage decency and be injurious to public morals, though not an open and notorious act of public indecency within the statute, is a misdemeanor at common law and punishable as such. *The State v. Appling*, 315.
9. An indictment founded on section 38 of article 2 of the act concerning crimes and punishments (R. C. 1845, p. 351) charged that the defendant did "feloniously make an assault on the body of one C. H. with a large stick of the length of four feet and the thickness of four inches, which stick he the said E. F. then and there held in both his hands, and with the stick aforesaid did then and there inflict on the body of the said C. H. great bodily harm under such circumstances which would have constituted manslaughter if death had ensued, contrary," &c.; *held insufficient* in that it did not charge the inflicting of the great bodily harm feloniously. *The State v. Feaster*, 824.
10. There may be an assault with intent to kill, although there is no striking or wounding; it would be error to instruct the jury that if the defendant might have struck, and did not, they should find defendant not guilty. *The State v. McClure*, 388.
11. An indictment, founded on section 28 of article 8 of the act concerning crimes and punishments, (R. C. 1845, p. 404,) charging that the defendant did "wilfully and contemptuously disturb *congregation* of people met for religious worship," &c., is bad. *The State v. Mitchell*, 420.
12. An indictment charging that the defendant "with force and arms, at &c., upon the body of one E. J., then and there being, feloniously did make an assault, and then and there feloniously and forcibly *did attempt to ravish* and unlawfully and carnally know the said E. J. against her will, who was then and there a woman of the age of ten years and upwards, contrary," &c., is bad under section 37 of article 2 of the act concerning crimes and punishments (R. C. 1845, p. 350,) in that it does not charge an assault *with intent to ravish*; it is also bad under section 1 of article 9 of said act. *The State v. Ross*, 426.
13. An indictment, founded on section 28 of article 8 of the act concerning crimes and punishments (R. C. 1845, p. 404), charging that the defendant, on, &c., at, &c., "did disturb a congregation of people then and there met for religious worship, by then and there making an assault upon one H., so near to the place of worship of said congregation of people as to disturb the order of the meeting, contrary," &c., is insufficient. *The State v. Bankhead*, 558.

CRIMINAL LAW.

See CRIMES AND PUNISHMENTS. PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

COURTESY.

1. Upon a descent cast no entry or actual possession is necessary in order to entitle a husband to courtesy. *Stephens v. Hume*, 349.

CUSTOM.

1. The custom or usage authorizing those engaged in the transportation of merchandise to advance to forwarding agents the existing charges thereon, and to hold the consignees and owners liable therefor, does not extend to or cover advances made on demands upon the consignees or owners wholly foreign to, and disconnected with, any cost or charge for transportation. *Steamboat Virginia v. Kraft*, 76.
2. A custom or usage of trade, to be valid and binding, must be reasonable. *Clark v. Humphreys*, 99.
3. A custom or usage among masters and clerks of steamboats for the master to draw bills of exchange upon the clerk, and negotiate the same, is an unreasonable custom and can not be invoked to fix a liability upon the owners to the parties to whom such bills of exchange may be transferred. *Ib.*

D

DAMAGES.

1. Where an employee is discharged before the term of his employment expires, the contract price of his services will be, *prima facie*, the measure of the damages received by him from the breach of the contract. *Nearns v. Harbert*, 352.
2. The Hannibal and St. Joseph Railroad Company entered—under the second section of the “act to amend an act entitled ‘an act to incorporate the Hannibal and St. Joseph Railroad Company,’” approved February 28, 1853, (Sess. Acts, 1853, p. 321)—upon the land of plaintiff and cut timber for the construction of their railroad; *held*, that the plaintiff was not entitled to treble damages under the “act to prevent certain trespasses.” (R. C. 1845, p. 1068.) *Lindell v. Hannibal and St. Joseph Railroad Co.*, 550.

DEED.

See CONVEYANCE.

DEFAULT.

See JUDGMENT BY DEFAULT.

DELIVERY.

1. Five hogsheads of sugar lying on the wharf of St. Louis were purchased by sample; *held*, that a delivery to the purchaser of the city weigher’s certificate and a bill of the price constituted a sufficient delivery of the sugar. *Glasgow v. Nicholson*, 29.

DEMAND.

1. In order that a constable may, under section 2 of article 7 of the act to provide for the organization, support and government of common schools, (Sess. Acts, 1858, p. 169, and R.C. 1855, p. 1439,) lawfully levy upon a delinquent's goods and chattels, he must first demand the payment of the assessment. *Atkison v. Amick*, 404.
2. In a suit to recover the value of property wrongfully converted, it is too late to object for the first time in the Supreme Court that no demand was made. *Folden v. Hendrick*, 411.

DEMURRER.

1. A demurrer should be resorted to to raise the defence of the statute of limitations, if at all, only where it clearly appears that the plaintiff's case has been fully stated, and that being so stated no recovery can be had. *McNair v. Lott*, 182.
2. Where an answer improperly blends and defectively states matters set forth therein as a defence and as a counter claim, the proper mode of taking advantage of the defect is, not by demurrer to the whole answer, but by motion to strike out either the whole of it or such portions as are defectively pleaded. *Kinney v. Miller*, 576.

DEPOSITIONS.

1. The fact that depositions offered in evidence may contain incompetent and illegal evidence will not justify the rejection of them altogether. The court should point out and exclude the inadmissible portions. *Hamilton v. Schull's Adm'r*, 165.

DESCENT CAST.

See **CURTESY**.

DETAINER.

See **FORCIBLE ENTRY AND DETAINER**.

DISTURBING PUBLIC WORSHIP.

See **CRIMES AND PUNISHMENTS**, 11, 18.

DIVORCE.

1. The complainant in an action for divorce must be a resident of this state, otherwise the petition may be properly dismissed. *Kruse v. Kruse*, 63.

DOMAIN, EMINENT.

See **CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES**.

DRAM-SHOPS.

See **PARDONING POWER. CRIMES AND PUNISHMENTS**.

E**EJECTMENT.**

1. A person in possession of premises at the commencement of an action of ejectment, to which he is not made a party, can not be dispossessed by virtue of a writ of *habere facias possessionem* issued under a judgment for plaintiff in said suit. *Garrison v. Savignac*, 47.

EMINENT DOMAIN.

See **CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES.**

EQUITY.

See **PARTITION, 1. ESTOPPEL, 1. LANDS AND LAND TITLES.**

1. Where a purchaser of land accepts from his vendor a conveyance with full warranty of title, there being no fraud in the sale, and the possession of the purchaser remaining undisturbed, he can not be relieved against the payment of the purchase money on the mere ground of a defect of title. *Connor v. Eddy*, 72.
2. Equitable relief can not be given in a suit asserting a legal right and seeking its enforcement. *Walker's Adm'r v. Walker*, 367.
3. At law the husband can not make a gift direct to the wife; and though equity, where the intent is clear that she shall enjoy the property granted to her separate use, will in such case interfere and constitute the husband a trustee and compel him to execute the trust, yet the proof of the trust must be clear and unequivocal. *Ib.*
4. One of several *cestuis que trust* can not single out a portion of the trust property and allege an exclusive right thereto, and assert that right in an action for its possession. *Edwards v. Welton*, 879.
5. Where trust funds are misapplied, the *cestui que trust* may follow the property acquired therewith, and assert the trust as against any one taking with notice. *Ib.*

EQUITY OF REDEMPTION.

See **MORTGAGE.**

ESTOPPEL.

1. Where a purchaser of land executes a deed of trust, with warranty of title, to secure to the vendor the payment of the purchase money, he is not estopped by his warranty to avail himself of any relief to which he would otherwise be entitled by virtue of the vendor's covenants to himself. *Connor v. Eddy*, 72.
2. A defendant who appears and files an answer to a petition will be precluded from taking advantage of a defect in the return of service of process upon himself. *Phillebart v. Evans*, 828.

EVIDENCE.

See **HUSBAND AND WIFE. STATUTE OF FRAUDS, 2. LIMITATION, 2, 4. WITNESS.**

1. In determining the meaning of a written instrument, the acts of the parties thereto are entitled to great weight. *Patterson v. Camden*, 18.
2. Where a deed of conveyance is duly acknowledged and recorded, and is shown not to be within the power of the party wishing to use the same, a certified copy thereof is admissible in evidence; no notice to produce the original is required. *Gilbert v. Boyd*, 27.
3. The appointment of trustees may be proven by parol evidence, where it does not appear that the evidence of the appointment is in writing. *Ib.*

EVIDENCE—(*Continued.*)

4. Objections to the admission of testimony should be specific, not general. *Grimm v. Gamache*, 41.
5. To make the contents of a document—a periodical publication—in a foreign language evidence, it must be translated, and be brought home to the party against whom it is sought to be used. *Meyer v. Witter*, 84.
6. S., a cripple, deformed from infancy, was indicted for murder; held, that evidence was inadmissible in his behalf to show that by reason of his weak and crippled condition of body he was rendered nervous and peculiarly sensitive to fear from external violence. *The State v. Shoultz*, 128.
7. The fact that depositions offered in evidence may contain incompetent and illegal evidence will not justify the rejection of them altogether. The court should point out and exclude the inadmissible portions. *Hamilton v. Schull's Adm'r*, 165.
8. In the case of an indictment for adultery, the declarations and admissions of the defendant are competent evidence to prove that he was a married man at the time of the alleged adultery. *The State v. McDonald*, 176.
9. Where a father sends home with his married daughter a slave, saying at the time that he had given the slave to her, it will not be presumed, as a matter of law, to be an absolute gift. *Beale's Adm'r v. Dale*, 301.
10. Courts may regulate in their discretion the order in which testimony shall be received; hence it is not error to refuse to permit a plaintiff to read to the jury as evidence in chief portions of a deposition taken by himself, and to reserve the remainder as rebutting testimony. *Young v. Smith*, 341. *Shackelford v. Smith*, 348.
11. Great latitude is allowed in the cross-examination of witnesses. *Ib.*
12. In a suit against A. and B. as partners, the declarations of A. are inadmissible in behalf of B. to disprove the partnership alleged. *Ib.*
13. Though, in a suit in behalf of persons claiming to be husband and wife to recover rent of the wife's land alleged to be due, it is competent for them to prove the marriage by evidence of cohabitation and by general reputation, yet the defendant may show that the alleged marriage is illegal and void. *Boatman v. Curry*, 488.
14. Judicial notice will not be taken of the laws of a foreign country. *Charlotte v. Chouteau*, 465.
15. If the foreign law is unwritten it may be proved by parol; it will not be presumed to be in writing. *Ib.*
16. Foreign written laws must be proved by the laws themselves properly authenticated. *Ib.*
17. It is the province of the court to instruct the jury as to the meaning and effect of the written foreign law adduced in evidence; and this construction should be the same which is given to it in the jurisdiction in which it is in force. *Ib.*
18. The opinions of text writers, the decisions of the courts, and the evidence of persons skilled in the foreign law, may be resorted to and consulted to enlighten the court in construing and expounding the foreign written law. *Ib.*
19. In a suit for freedom the onus of proving his right to freedom must rest upon the plaintiff; but the law does not couple the right to sue with

EVIDENCE—(Continued.)

- ungenerous conditions; he may prove such facts as are pertinent to the issue, and may invoke such presumptions as the law raises from particular facts. *Ib.*
20. Where the facts in evidence will warrant it, the court should instruct the jury that they *may* reject the whole of the testimony of a witness who has wilfully sworn falsely in regard to any material fact. *The State v. Dwire*, 558.
 21. A party relying upon a sheriff's deed to show title in himself, must produce the deed itself in evidence; unless its absence be accounted for, secondary evidence of its contents can not be admitted. *Smith v. Phillips*, 556.
 22. Hearsay evidence is inadmissible. *Ib.*
 23. To entitle a party to a suit, under the eleventh section of the twenty-fourth article of the practice act of 1849, or the third section of the act concerning witnesses (R. C. 1855, p. 1577), to examine as a witness in his behalf a party to the suit, the party summoned must be an *adverse* party, and not merely an opposing party on the record. *Harris v. Harris*, 567.
 24. A member of a municipal corporation will be presumed to be aware of its by-laws and ordinances. *Inhabitants of Palmyra v. Morton*, 592.

EXECUTION.

See SHERIFF'S SALE. JUSTICES' COURTS, 4, 6, 7.

1. A. sued B. and C. in a justice's court, and obtained judgment; execution issued and was returned "nulla bona" as to one of the defendants, but whether as to B. or C. did not appear; nor did it appear against which of said defendants said execution issued, nor whether it issued against both defendants. A transcript of said judgment was filed in the Circuit Court, and an execution was issued thereon, and real estate belonging to B. was sold at a sheriff's sale thereunder. *Held*, that the purchaser at sheriff's sale acquired no title. *Linderman v. Edson*, 106.

EXECUTION.

See ADMINISTRATION.

EXECUTOR'S BOND.

See ADMINISTRATION, 2.

1. The bond required by law of an executor is broken if he fail to make a complete and perfect inventory of the estate of his testator; his securities will be liable for a failure on his part to inventory and account for money of the testator received by him after the death of the testator and before the granting of the letters testamentary. *Sherwood's Adm'r v. Hill*, 891.

F

FAYETTE, CITY OF.

1. The act incorporating the city of Fayette confers upon the mayor thereof of the same jurisdiction, in cases arising in said city, that justices of the

FAYETTE, CITY OF—(Continued.)

peace have in their respective townships; (Sess. Acts, 1855, Adj. Sess. p. 212, sec. 11;) he can not entertain jurisdiction of an action for a penalty exceeding ninety dollars imposed by an ordinance of said city. *City of Fayette v. Shafroth*, 445.

FORCIBLE ENTRY AND DETAINER.

1. A person in possession of premises at the commencement of an action of ejectment, to which he is not made a party, can not be dispossessed by virtue of a writ of *habere facias possessionem* issued under a judgment for plaintiff in said suit. *Garrison v. Saignac*, 47.
2. If in the execution of such writ a person in possession of the premises at the commencement of the suit, and not a party thereto, is dispossessed, and possession given to the plaintiff, and upon the removal of the force the person dispossessed returns to the possession, the plaintiff will not thereby acquire such a possession by the execution of the writ as will entitle him to sustain an action of unlawful detainer against the person so returning to the possession. *Ib.*

FOREIGN LAW.

1. Judicial notice will not be taken of the laws of a foreign country. *Charlotte v. Chouteau*, 465.
2. If the foreign law is unwritten it may be proved by parol; it will not be presumed to be in writing. *Ib.*
3. Foreign written laws must be proved by the laws themselves properly authenticated. *Ib.*
4. It is the province of the court to instruct the jury as to the meaning and effect of the written foreign law adduced in evidence; and this construction should be the same which is given to it in the jurisdiction in which it is in force. *Ib.*
5. The opinions of text writers, the decisions of the courts, and the evidence of persons skilled in the foreign law, may be resorted to and consulted to enlighten the court in construing and expounding the foreign written law. *Ib.*

FRAUD AND FRAUDULENT CONVEYANCES.

See **LANDLORD AND TENANT**, 1. **STATUTE OF FRAUDS**, 1, 2.

1. Although a New Madrid certificate should be obtained through fraud or mistake, it is not void; it is good as against the United States until it is annulled or set aside. *Mitchell v. Barker*, 31. *Lee & Gant v. Parker*, 85.
2. It is a good defence to an action on a promissory note that it was given to the plaintiff in furtherance of an attempt on his part to defraud his creditors. *Hamilton v. Scull's Adm'r*, 165.
3. Where a purchaser at a sheriff's sale practices any deceit or imposture, or is guilty of any trick or device, the object of which is to get the property at an under value, the sale may be set aside in favor of the defendant in the execution. *Stewart v. Nelson*, 309.
4. Though a promissory note given by way of compromise of a doubtful right is valid and binding, it is a good defence that it was obtained through a fraudulent suppression of the truth. *Stephens v. Spiers*, 386.

FRAUD AND FRAUDULENT CONVEYANCES—(Continued.)

5. Where the payee of a negotiable promissory note assigns the same, not for value, but fraudulently, with a view to prevent the maker from setting up by way of set-off a demand against the payee, the maker may in a suit against him by such assignee or endorser, plead the fraudulent assignment, and set-off such demand. *Martindale v. Hudson*, 422.

FREEDOM.

1. In a suit for freedom the onus of proving his right to freedom must rest upon the plaintiff; but the law does not couple the right to sue with ungenerous conditions; he may prove such facts as are pertinent to the issue, and may invoke such presumptions as the law raises from particular facts. *Charlotte v. Chouteau*, 465.

G**GUARDIAN'S SALE.**

1. The seventh section of the "act concerning minors, orphans and guardians," approved February 8, 1825, (R. C. 1825, p. 417,) conferred upon the probate courts power to authorize guardians of minors to sell real estate of such minors at private sale to complete their education. *Robert v. Casey*, 585.
2. Upon petition of a guardian, under said act, to a probate court for leave to sell real estate of his ward, the court ordered, May 4, 1885, that the guardian, after an appraisal by three disinterested householders, should sell the lot at private sale for not less than three-fourths of its appraised value, and should make report of his proceedings at the next term of the court. After the next term of the court, the guardian made a private sale of the lot for more than the sum at which the lot had been appraised, and executed a deed, dated October 8, 1885, to the purchaser; but he made no report whatever to the court of the sale or of his proceedings under the order. *Held*, that the failure of the guardian to make report of the sale and proceedings under the order would not invalidate the title of the purchaser, the said act of February 8, 1825, not requiring an approval of such sale by the probate court; nor would the fact, that the sale was made subsequent to the term at which the guardian was directed to report his proceedings under the order, invalidate the sale. *Ib.*
3. The original affidavit of the appraisers, and their written appraisement, and the deed of the guardian, though never reported to the court, are admissible in evidence to show the proceedings of the guardian under the order of the probate court. *Ib.*

GIFT.

See **PRESUMPTION OF GIFT.**

GUARANTY.

1. An agreement guarantying the performance of a contract previously entered into with another, though in writing, must have a consideration to be valid and binding. *Pfeiffer v. Kingsland*, 66.

H

HUSBAND AND WIFE.

See CURTESY. SLANDER, 2, 3.

1. A merchant furnishing goods to a wife living apart and separated from her husband must ascertain at his peril whether the circumstances warrant him in giving credit to her; he must take notice that there is a separation. *Porter v. Bobb*, 36.
2. Where a negotiable promissory note is drawn in favor of a married woman, she may, with the assent of her husband, legally transfer the same by an endorsement in her own name. *McLain v. Weidemeyer*, 364.
3. This assent is sufficiently shown if it appear that the note, so endorsed by her in her own name, was executed in her favor in consideration of the transfer by her to the maker thereof of a bill of exchange transmitted to her by her husband, absent in California. *Ib.*
4. At law the husband can not make a gift direct to the wife; and though equity, where the intent is clear that she shall enjoy the property granted to her separate use, will in such case interfere and constitute the husband a trustee and compel him to execute the trust, yet the proof of the trust must be clear and unequivocal. *Walker's Adm'r v. Walker*, 867.
5. If personal property, other than choses in action, be in such a situation that the husband may, if he will, lawfully take it into his hands at any moment, this is a sufficient reduction into possession, although he should not actually take it into his custody. *Ib.*
6. Where a husband is in possession of personal property bequeathed to his wife by a former husband, as administrator of such former husband, and he makes a final settlement, and it is ordered by the court that he and his wife retain all the estate of the deceased in their hands: *held*, that the husband's possession as administrator ceases, and his possession *jure mariti* commences, at the date of such order; this would not however be a reduction into possession by him of a bond or note for the wife's money taken by him as administrator. *Ib.*
7. By the law of Kentucky in the year 1830 slaves vesting in a wife, whether in remainder or otherwise, although not reduced to possession by the husband, passed to the husband upon her death in case he survived. *Houck v. Camplin*, 378.
8. A wife may when she becomes discovert affirm and ratify a deed made by her during coverture. *Boatman v. Curry*, 438.
9. Though, in a suit in behalf of persons claiming to be husband and wife to recover rent of the wife's land alleged to be due, it is competent for them to prove the marriage by evidence of cohabitation and by general reputation, yet the defendant may show that the alleged marriage is illegal and void. *Ib.*

HYPOTHECATION.

See MORTGAGE.

I

INDICTMENT.

See CRIMES AND PUNISHMENTS.

INFANTS.

See GUARDIAN'S SALE.

INSTRUCTIONS.

See EVIDENCE, 17, 18. PRACTICE, 38, 40.

1. It is error to give instructions where there is no evidence to support them. *Brown v. Lewis*, 385.
2. The Supreme Court will not reverse a judgment for a refusal of a court to give an instruction to the effect that, "admitting all the testimony to be true, the plaintiff can not recover." *Folden v. Hendrick*, 411.
3. Where the facts in evidence will warrant it, the court should instruct the jury that they *may* reject the whole of the testimony of a witness who who has wilfully sworn falsely in regard to any material fact. *The State v. Dwire*, 553.

J

JOINDER OF ACTIONS.

See SLANDER.

1. Where several causes of action are joined in the same petition they must be separately stated. *Doan v. Holly*, 357.
2. It is improper to join in the same petition a cause of action against A. and B. with one against B. alone. *Ib.*

JUDGMENT.

See JUSTICES' COURTS, 4, 5, 6, 8. PRACTICE, 22, 26, 27.

JUDGMENT BY DEFAULT.

1. The fact that the defendant, A. B., when the cause was called for trial and he was called into court, appeared and objected to the court's proceeding with the cause on the ground that he had not been served with process as required by law, is not such an appearance as would make a judgment by default against him regular. *Smith's Adm'r v. Rollins*, 408.
2. Where there is a defective service of process upon one of several defendants, he is entitled to have a judgment by default against him and his co-defendants jointly set aside. Being an entire thing, it must be set aside as to all the defendants. *Ib.*

JUDICIAL DEPARTMENT OF GOVERNMENT.

See CONSTITUTIONAL LAW, 12, 18.

JUDICIAL PROCEEDING.

See CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES, 15.

JURORS.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 1, 3.

JURY.

See PRACTICE, 5. CONSTITUTIONAL LAW, 18. EVIDENCE, 17. INSTRUCTIONS.

1. Although, as a general rule, the interpretation of written instruments belongs to the court and not to the jury, the construction and true interpretation of commercial correspondence may, under proper circumstances, be properly left to the consideration of the jury. *Fagin v. Connolly*, 94.
2. Whether a weapon used, a stick or club, is of a character likely to produce death or great bodily harm is a question of fact to be passed upon by the jury. *The State v. Nueslein*, 111.

JUSTICE OF THE PEACE.

See JUSTICES' COURTS, 8.

JUSTICES' COURTS.

1. Strict conformity with technical rules of pleading should not be enforced in proceedings before justices of the peace. *Holland v. Steamboat Winslow*, 57.
2. A complaint filed before a justice of the peace against a steamboat is not rendered fatally defective by reason of the fact that the demand was stated therein to have "accrued against the said steamboat on account of the mate, the captain, or the clerk, agents thereof, for work and labor done on board of said steamboat as a laborer," &c. *Ib.*
3. A justice of the peace certified a transcript as follows: "I certify the above and foregoing to be a full and complete transcript of the above entitled cause now of record on docket of David W. Doak, deceased, late justice of the peace within and for St. Ferdinand township, in St. Louis county. [Signed] S. H., Justice of the Peace." *Held*, that the justice so certifying would be presumed to be in the lawful possession of the docket of the deceased justice. *Linderman v. Edson*, 105.
4. A. sued B. and C. in a justice's court, and obtained judgment; execution issued and was returned "nulla bona" as to one of the defendants, but whether as to B. or C. did not appear; nor did it appear against which of said defendants said execution issued, nor whether it issued against both defendants. A transcript of said judgment was filed in the circuit court, and an execution was issued thereon, and real estate belonging to B. was sold at a sheriff's sale thereunder. *Held*, that the purchaser at sheriff's sale acquired no title. *Ib.*
5. Where an action is commenced in a justice's court by process, it is not necessary that a confession of judgment should be in writing. *Franse v. Owens*, 329.
6. Where a defendant in a justice's court appears at the return day of process and confesses a judgment, and an entry of such confession is made upon the justice's docket, an execution may lawfully issue, although no entry is made upon the docket of a judgment upon the confession. *Ib.*
7. Where a defendant in a suit before a justice's court is served with process

JUSTICES' COURTS—(*Continued.*)

- in the township in which the suit is begun, it will be presumed, in the absence of evidence to the contrary, that he resides in such township; the return of a constable of such township on an execution directed to him of "no property found of defendant in said township whereof to levy," is sufficient to warrant the issuing of an execution from the office of the clerk of the circuit court. *Ib.*
8. An authentication of a transcript of a judgment by a justice of the peace in the following form: "I certify that the foregoing contains an entry made on my docket. [Signed] A. B., J. P.," is sufficient. *Ib.*
 9. The fact that an instrument, the foundation of an action, is not filed with a justice of the peace, is no ground for dismissing the suit; at most such failure is a ground for a continuance. *Boatman v. Curry*, 433.

L

LAND COURT.

1. Where the St. Louis Land Court rightfully obtains jurisdiction in a case, although the facts afterwards disclosed would have authorized a proceeding in another court, the Land Court should furnish relief. *Paul v. Fulton*, 156.

LANDLORD AND TENANT.

1. It is no defence to a suit for the recovery of rent, that the defendant had entered into the occupancy of the premises under an agreement with the plaintiff that he (the plaintiff) would execute a lease therefor for the term of three years, and would make certain repairs, the making of the repairs not being a condition of the leasing, and that the plaintiff neglecting and refusing to do the same, he (defendant) repudiated the contract and abandoned the premises. *Goodfellow v. Noble*, 60.
2. An affidavit in a proceeding against A. and B. under the "Act concerning landlords and tenants in the county of St. Louis," (R. C. 1845, Appendix, p. 1101,) which states a lease by plaintiff to A. and a demand of rent due of B., the person occupying the premises, is not rendered defective by reason of its not charging any privity between plaintiff and B., or by its not stating that the relations of landlord and tenant existed between the plaintiff and B. (*Willi v. Peters*, 11 Mo. 395, affirmed.) *Shepard v. Martin*, 198.
3. An affidavit in a proceeding under the "Act concerning landlords and tenants in the county of St. Louis," (R. C. 1845, Appendix, p. 1101,) which states that a certain lot was let to M., the defendant, for a term of twenty years at a certain rent; that the sum of \$695.50 is now due for the said rent; that the same has been demanded and payment has not been made, but which does not state of whom defendant leased the lot, or who was his landlord, or to whom he owed the debt due for rent, is defective; its defectiveness may be taken advantage of by a motion in arrest of judgment. *Evans v. Miller*, 195.
4. Although rent reserved be payable monthly, yet, if the letting be general and without limitation as to time, it will be a tenancy from year to

LANDLORD AND TENANT—(Continued.)

year, and a month's notice to quit will not terminate the tenancy.
Ridgely v. Stillwell, 570.

LANDS AND LAND TITLES.

1. A patent to a fictitious person is a nullity. *Thomas v. Wyatt*, 24. *Thomas v. Boerner*, 27.
2. Although a New Madrid certificate should be obtained through fraud or mistake, it is not void; it is good as against the United States until it is annulled or set aside. *Mitchell v. Parker*, 81. *Lee & Gantt, v. Parker*, 85.
3. The act of Congress of June 18, 1812, *proprio vigore*, vested in the inhabitants of the various towns and villages designated in the first section of said act the absolute legal title to the common possessed and used as such by them respectively prior to December 20, 1803. *City of Carondelet v. City of St. Louis*, 448.
4. To enable the inhabitants of a town or village designated in said act to assert title to, and recover possession of, land as common confirmed by said act of June 18, 1812, no United States survey is required; proof of possession and user as common prior to December 20, 1803, is sufficient. *Ib.*
5. The approved U. S. survey of the common of St. Louis is not conclusive as against the inhabitants of the adjacent town (now city) of Carondelet. It may be shown in their behalf that land embraced within said survey was used and possessed prior to December 20, 1803, as common of Carondelet, and that too although it is not embraced within the U. S. survey of the common of Carondelet. *Ib.*
6. An approved United States survey of the common confirmed to the inhabitants of a town or village by the act of June 18, 1812, is *prima facie* evidence of the true location and extent of such common. *Ib.*
7. Such survey would not, however, be conclusive and binding upon the inhabitants of such village unless accepted; it might be shown that it had never been accepted, and that it was incorrect. *Ib.*
8. No formal act is necessary to constitute an acceptance; it may be inferred from various acts and circumstances; and it is the province of the court to declare to the jury, as a matter of law, the legal effect of such acts and circumstances. *Ib.*
9. In the case of a confirmation under act of Congress of March 8, 1807, where the confirmation is accompanied with the condition that the land be surveyed, if—the true location of the tract confirmed being in doubt—the legal representative of the confirmee appropriates the land as afterwards located and surveyed by the United States, and receives a patent therefor as thus located and surveyed, a person claiming the land confirmed under the confirmee as elsewhere located, by title acquired subsequent to the appropriation, can not dispute the propriety of the location as actually made. The legal representative of the confirmee, prior in point of time and of right, would have a prior right to assent to the location as made by the United States government; there being but one confirmation, one satisfaction in favor of the legal representa-

LANDS AND LAND TITLES—(Continued.)

tives of the confirmee exhausts the obligations of the government. (Per SCOTT, Judge.) *Maguire v. Tyler*, 484.

10. In the case of a confirmation under act of Congress of March 3, 1807, where the confirmation is accompanied with the condition that the land confirmed should be surveyed, such survey, when made by the proper executive officers of the United States government, conclusively settles the question of the locality of the tract confirmed, and the courts, either of law or equity, can not locate the tract elsewhere. (Per NAPTON, Judge.) *Ib.*

LEGISLATURE.

See **PARDONING POWER**, 1, 2.

LIEN.

See **MECHANICS' LIEN**.

LIMITATION.

See **PRACTICE**, 10.

1. What will constitute an adverse possession of land under the statute of limitations must be determined by the circumstances of each case. *Draper v. Shoot*, 197.
2. To support and establish such an adverse possession, a less weight of evidence is required where the entry is with, than where it is without, color of title. *Ib.*
3. The acts of ownership exercised must be visible and notorious, and of such a nature as indicate a notorious claim of property in the land. *Ib.*
4. In determining the question of adverse possession, the payment of taxes by the person asserting title by adverse possession is a fact that may, with other circumstances, be considered by the jury. *Ib.*

M**MARRIAGE.**

See **HUSBAND AND WIFE**.

1. In the case of an indictment for adultery, the declarations and admissions of the defendant are competent evidence to prove that he was a married man at the time of the alleged adultery. *The State v. McDonald*, 176.
2. Where a father sends home with his married daughter a slave, saying at the time that he had given the slave to her, it will not be presumed, as a matter of law, to be an absolute gift. *Beale's Adm'r v. Dale*, 301.

MASTER OF VESSEL.

See **SHIPPING**.

MAYOR OF CITY OF FAYETTE.

1. The act incorporating the city of Fayette confers upon the mayor thereof the same jurisdiction, in cases arising in said city, that justices of the peace have in their respective townships; (Sess. Acts, 1865, Adj. Sess.

MAYOR OF THE CITY OF FAYETTE—(Continued.)

p. 212, sec. 11;) he can not entertain jurisdiction of an action for a penalty exceeding ninety dollars imposed by an ordinance of said city. *City of Fayette v. Shafroth*, 446.

MEASURE OF DAMAGES.

See **DAMAGES**.

MECHANICS' LIEN.

1. The mechanics' lien act of 1845 (R. C. 1845, p. 788) regulated proceedings instituted in St. Louis county to enforce a mechanic's lien in cases where the materials were furnished or the work performed under a contract with the owner. *Clark & Lemon v. Brown*, 559.
2. Where the owner of a building, upon which there is a mechanic's lien for materials furnished under a contract with himself, conveys the premises to a purchaser before the institution of a suit to enforce the lien, no judgment can be rendered, in a suit to enforce the lien commenced by *scire facias*, unless the purchaser be made a party to the record; nor if, in such case, suit be brought in the ordinary form against the vendor, could an execution issue against the property unless a *scire facias* shall have first issued and been served upon such purchaser. *Ib.*
3. A material man instituted proceedings by *scire facias*, under section 8 of the "act for securing liens to mechanics and others," (R. C. 1845, p. 785,) to enforce a lien; the original debtor—the contractor—and the owner of the building were made parties to the proceeding; the plaintiff dismissed the proceeding as to the debtor; held that, having dismissed the proceeding as to the debtor, there was no party on the record to defend the suit, and the cause could not proceed against the owner of the building alone. *Wibbing v. Power*, 599.
4. The general mechanics' lien law of 1845 was in force in St. Louis county as far as it was not inconsistent with the local act of 1848. *Ib.*

MINORS.

See **GUARDIAN'S SALE**.

MORTGAGE.

1. To extinguish or bar an equity of redemption, where lapse of time alone is relied on, twenty years must have elapsed since the last recognition of the mortgage. *McNair v. Lott*, 182.
2. A., in the year 1819, to secure the repayment of a loan of money, executed an instrument in the French language in the form of a French hypothecation and containing the words, "*oblige, engage, allieré, affecté et hypothéqué*: held, that this was a mortgage within the act of October 20, 1807, concerning Mortgages. (1 Terr. Laws, p. 182.) *Ib.*

MOTION IN ARREST OF JUDGMENT.

See **PRACTICE**.

MURDER.

See **CRIMES AND PUNISHMENTS**.

N

NEW MADRID CERTIFICATE.

1. Although a New Madrid certificate should be obtained through fraud or mistake, it is not void; it is good as against the United States until it is annulled or set aside. *Mitchell v. Parker*, 81. *Lee & Gantt v. Parker*, 85.

NEW TRIAL.

See PRACTICE, 4.

1. Where, during the pending of a motion for a new trial on the ground that the verdict is against the weight of evidence, a cause is removed to another circuit by an act of the legislature transferring the county in which the suit is pending to such other circuit, the judge of such other circuit should not decline disturbing the verdict, and refuse to grant a new trial, on the ground that the judge, not having heard the evidence as delivered by the witnesses on the stand, had not had the opportunity which the jury had of deciding upon the credibility of the witnesses. If embarrassed from such cause, the court should grant a new trial. *Woolfolk v. Tate*, 597.

NOTICE.

1. To constitute a person a *bona fide* purchaser for value without notice within the rule that protects such a purchaser the purchase money should be paid before notice is received. *Paul v. Fulton*, 156.
2. Possession of real property under an unrecorded deed, though brought home to a subsequent purchaser, does not constitute, as a matter of law, actual notice of such prior deed within the meaning of our registry act. *Vaughn v. Tracy*, 318.
3. Possession and apparent ownership are, however, facts from which a jury will be warranted in inferring actual notice. *Ib.*
4. Where the evidence relied on to bring home to a subsequent purchaser actual notice of a prior unrecorded deed is a declaration of such subsequent purchaser to the effect that his grantor had told him before his purchase that the plaintiff (the prior purchaser) "had a mill on the land and would have to move it away now," it is error to instruct the jury that "if the plaintiff was on the acre of land and mill thereon at the time of the defendant's purchase, and that fact was then known to defendant, it was a sufficient notice in law of the plaintiff's previous purchase so as to affect the defendant with notice of the plaintiff's title." *Ib.*

NOTICE TO QUIT.

1. Although rent reserved be payable monthly, yet, if the letting be general and without limitation as to time, it will be a tenancy from year to year, and a month's notice to quit will not terminate the tenancy. *Ridgely v. Stillwell*, 570.

O

OBSCENITY.

See CRIMES AND PUNISHMENTS, 8.

OPENING STREETS.

See CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES.

ORDER OF REFERENCE.

See PRACTICE, 27.

ORDINANCES.

See PALMYRA.

ORPHANS.

See GUARDIAN'S SALE.

P

PALMYRA.

1. The trustees of the town of Palmyra had power, under the tenth section of the act incorporating said town, (Local Acts, 1845, p. 151,)—if the owner or occupier of lots adjacent to the streets of said town should fail to pave the same as directed by the ordinances—to pave the same and recover the full expense thereof from such owner or occupier. The charter, authorizing such assessments, is in conformity to the constitution. *Inhabitants of Palmyra v. Morton*, 592.
2. Such a suit is properly brought in the name of the corporation. *Ib.*
3. A member of a municipal corporation will be presumed to be aware of its by-laws and ordinances. *Ib.*

PANEL.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 1, 8.

PARDONING POWER.

1. The pardoning power belongs exclusively to the executive department of the government and can not be exercised by the legislative department. *The State v. Sloes*, 291.
2. The "act to relieve certain persons from the penalties of an act entitled 'an act to regulate dram-shops,' approved December 18, 1855, (R. C. 1855, p. 682)," approved February 12, 1857, (Sess. Acts, 1857, p. 60,) releasing all persons, then indicted for violations of the said act to regulate dram-shops committed before December 15, 1856, from prosecution, provided each individual shall pay all the costs and a fee of two dollars to the circuit attorney—and declaring that whenever any person so indicted shall pay said costs and fee, it shall be the duty of the circuit judge to order said case to be dismissed—is unconstitutional, it being an attempted exercise of the pardoning power, and also an interference with the judicial department of the government. *Ib.*

PART PERFORMANCE.

1. The possession that will be deemed such a part performance of a parol contract for the sale of land as will take the case out of the statute of frauds is an actual possession taken by the vendee under the contract, with the consent of the vendor, and with a view to the performance of the contract, and not the constructive possession which the law imputes to the owner when there is no actual adverse possession in a stranger. *Charpiot v. Sigerson*, 68.
2. In order to take a case out of the statute of frauds on the ground of a part performance of a parol contract for the sale of land, the acts relied on should be definite and referable exclusively to the contract, and the contract itself should be fully established in all its essential terms. *Ib.*

PARTIES.

See **PLEADING. SLANDER.**

PARTITION.

1. A. instituted a suit for specific performance of an agreement to convey an undivided interest in certain premises, claiming also compensation for improvements made by him, with the consent of the vendor, upon a portion of said premises; the court rendered a decree vesting in A. an undivided interest of one-half, but allowing no compensation for improvements; held, that A. would not be entitled, in a suit for partition, to have allotted to himself that portion of said premises upon which said improvements had been made or to have compensation made therefor. *Wainright v. Rowland*, 58.
2. Lands may be subdivided for purposes of sale, in an action for partition, as well as for partition in kind. *Ib.*
3. The first judgment in an action for partition is interlocutory; a writ of error will not lie thereto. *Stephens v. Hume*, 349.
4. In partition sales, in statutory proceedings for partition, there is no warranty of title. *Schwartz v. Dryden*, 572.
5. Where the parties to a statutory proceeding for partition have no title to a portion of the land, a purchaser, at the partition sale, of such portion—there being no fraud or misrepresentation—will not be entitled to have such sale set aside as to such portion on the ground of this want of title. (SCOTT, Judge, dissenting.) *Ib.*

PARTNERSHIP.

1. Where a partnership is dissolved and a new partnership formed, the debts of the old firm may, by consent of all parties—the creditors, the old firm and the new—be transferred to the new firm, and the old firm may be discharged. *Patterson v. Camden*, 18.
2. In a suit against A. and B. as partners, the declarations of A. are inadmissible in behalf of B. to disprove the partnership alleged. *Young v. Smith*, 341. *Shackelford v. Smith*, 348.
3. Persons may be held liable as partners to third persons, though not as partners as between themselves. *Ib.*
4. Where one of two partners pays to a creditor of the firm one-half the debt due from the partnership, the partner so paying will not be entitled

PARTNERSHIP—(Continued.)

to recover of the other partner the sum so paid unless it should appear, upon settlement of the affairs of the partnership, that such sum is due to him from the partnership. *Morin v. Martin's Adm'r*, 860.

PATENT.

1. A patent to a fictitious person is a nullity. *Thomas v. Wyatt*, 24. *Thomas v. Boerner*, 27.

PLEADING.

See **JUSTICES' COURTS**, 2. **CORPORATION**, 8. **CRIMES AND PUNISHMENTS**.

1. Strict conformity with technical rules of pleading should not be enforced in proceedings before justices of the peace. *Holland v. Steamboat Winslow*, 57.
2. A., holding lands in trust, devised them to his executor with direction to sell and convert into personal property; the executor sold and conveyed the same; *held*, in a suit against the purchaser and the executor to establish the trust, that the heirs of A. were not necessary parties. *Paul v. Fulton*, 156.
3. A demurrer should be resorted to to raise the defence of the statute of limitations, if at all, only where it clearly appears that the plaintiff's case has been fully stated, and that being so stated no recovery can be had. *McNair v. Lott*, 182.
4. Where several causes of action are joined in the same petition they must be separately stated. *Doan v. Holly*, 357.
5. It is improper to join in the same petition a cause of action against A. and B. with one against B. alone. *Ib.*
6. Matter set up in an answer as a counter claim should be separately stated. *Kinney v. Miller*, 576.
7. Where an answer improperly blends and defectively states matters set forth therein as a defence and as a counter claim, the proper mode of taking advantage of the defect is, not by demurrer to the whole answer, but by motion to strike out either the whole of it or such portions as are defectively pleaded. *Ib.*
8. In a suit for slanderous words spoken of a wife, she should be joined with her husband as a party to the suit; the husband alone could not recover unless he avers and proves special damage. *Johnson v. Dicken*, 580.

POSSESSION.

See **PART PERFORMANCE**, 1, 2. **LIMITATION**. **STATUTE OF FRAUDS**. **VENDOR AND PURCHASER**.

1. Upon a descent cast no entry or actual possession is necessary in order to entitle a husband to curtesy. *Stephens v. Hume*, 349.

PRACTICE.

See **JUSTICES' COURTS**. **MECHANICS' LIEN**. **CONDAMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES**, 17.

1. A writ of error will be dismissed for the reason that it is left blank as to the names of the parties to the suit. *Fremon v. City of Carondelet*, 62.

PRACTICE—(*Continued.*)

2. No amendment of such writ can be allowed in the Supreme Court. *Ib.*
3. The complainant in an action for divorce must be a resident of this state, otherwise the petition may be properly dismissed. *Kruse v. Kruse*, 68.
4. It can not be assigned for error that a new trial was improperly granted. *Keating v. Bradford*, 86.
5. The Supreme Court will not interfere with the verdicts of juries on the ground that they are against the weight of evidence. *The State v. McClure*, 888.
6. A failure to make all the representatives of a deceased plaintiff and a deceased defendant parties to the suit on or before the third term after the suggestion of the deaths, will cause the suit to abate only as to those representatives not brought in and made parties; it is error to order the suit to abate entirely. *Farrell's Adm'r v. Brennan's Adm'r*, 88.
7. Where, upon the decease of a party plaintiff, his administrator is made plaintiff as his representative, without the appearance of the defendant or notice to him, the irregularity will be cured by the appearance of both parties at a subsequent term, and the granting of a continuance on the motion of defendant. *Ib.*
8. A writ of error will lie to the decision of a circuit court in a proceeding under section 81 of the act concerning wills to set aside a will (R. C. 1845, p. 1088); the thirty-second section of said act does not confine the remedy of a party aggrieved to an appeal. *Ib.*
9. Judgment affirmed; no bill of exceptions filed. *The State v. Timmerberg*, 173.
10. A demurrer should be resorted to to raise the defence of the statute of limitations, if at all, only where it clearly appears that the plaintiff's case has been fully stated, and that being so stated no recovery can be had. *McNair v. Lott*, 182.
11. In an action for the possession of a slave, in which the value of the slave was alleged to be nine hundred dollars, and the damages for the detention one hundred dollars, the jury did not find the value of the slave, but "assessed the *damages* at eight hundred dollars." *Quere*: whether a judgment for such sum could be supported? *Beale's Adm'r v. Dale*, 301.
12. The fact that the return of service of process is defective is no ground for dismissing a suit. *Phillibart v. Evans*, 323.
13. A defendant who appears and files an answer to a petition will be precluded from taking advantage of a defect in the return of service of process upon himself. *Ib.*
14. A bill of exceptions can not, except by consent, be allowed and signed subsequently to the term at which the trial is had. *Ellis v. Andrews*, 827.
15. Where it is agreed that the bill of exceptions may be allowed and filed within ten days after the end of the term, and it is not allowed and signed within the ten days, it can not be afterwards allowed and signed. *Ib.*
16. Where a defendant in a suit before a justice's court is served with process in the township in which the suit is begun, it will be presumed, in

PRACTICE—(*Continued.*)

- the absence of evidence to the contrary, that he resides in such township; the return of a constable of such township on an execution directed to him of "no property found of defendant in said township whereof to levy," is sufficient to warrant the issuing of an execution from the office of the clerk of the circuit court. *Franse v. Owens*, 329.
17. Where there is no evidence whatever tending to show a liability on the part of one of two defendants, the court should, when requested so to do, direct the jury to find a verdict in his favor. *Brown v. Lewis*, 385.
 18. It is error to give instructions where there is no evidence to support them. *Ib.*
 19. Whenever instructions given to a jury as a whole fairly present the law of the case to the jury, the Supreme Court will not reverse for a defect or slight impropriety in any particular instruction. *The State v. McClure*, 388.
 20. Courts may regulate in their discretion the order in which testimony shall be received; hence it is not error to refuse to permit a plaintiff to read to the jury as evidence in chief portions of a deposition taken by himself, and to reserve the remainder as rebutting testimony. *Young v. Smith*, 341. *Shackelford v. Smith*, 348.
 21. Great latitude is allowed in the cross-examination of witnesses. *Ib.*
 22. Where a judgment is regularly rendered against a defendant, the court can not at a subsequent term, there being no irregularity, set the same aside and permit the defendant to file an answer. *Brewer v. Dinwiddie*, 351.
 23. The Supreme Court will not grant new trials on the ground that verdicts are against the weight of evidence. *Nearns v. Harbert*, 352.
 24. Equitable relief can not be given in a suit asserting a legal right and seeking its enforcement. *Walker's Adm'r v. Walker*, 367.
 25. One of several *cestuis que trust* can not single out a portion of the trust property and allege an exclusive right thereto, and assert that right in an action for its possession. *Edwards v. Welton*, 379.
 26. Where a judgment is regularly rendered, it can not be set aside at a subsequent term of the court; where however it is irregular, the court may at a subsequent term correct the irregularity. *Stacker v. Cooper Circuit Court*, 401.
 27. After an order of reference in a cause is made, and while it is still standing unexecuted and in force, final judgment in the cause should not be rendered; if so rendered, the court may, at a subsequent term, recall the same and set it aside. *Ib.*
 28. The fact that the defendant, when the cause was called for trial and he was called into court, appeared and objected to the court's proceeding with the cause on the ground that he had not been served with process as required by law, is not such an appearance as would make a judgment by default against him regular. *Smith's Adm'r v. Rollins*, 408.
 29. Where there is a defective service of process upon one of several defendants, he is entitled to have a judgment by default against him and

PRACTICE—(*Continued.*)

- his co-defendants jointly set aside. Being an entire thing, it must be set aside as to all the defendants. *Ib.*
80. In a suit to recover the value of property wrongfully converted, it is too late to object for the first time in the Supreme Court that no demand was made. *Folden v. Hendrick*, 411.
81. The Supreme Court will not reverse a judgment for a refusal of a court to give an instruction to the effect that, "admitting all the testimony to be true, the plaintiff can not recover." *Ib.*
82. The fact that an instrument, the foundation of an action, is not filed with a justice of the peace, is no ground for dismissing the suit; at most such failure is a ground for a continuance. *Boatman v. Curry*, 433.
83. A petition asserted an equitable right; the defendants filed their answer thereto; when the cause was called for trial, both plaintiff and defendant having announced themselves ready for the trial and hearing of the causes, the court *ex mero motu* dismissed the petition; *held*, that in thus dismissing the petition the court committed error. *Magwire v. Tyler*, 484.
84. A proceeding instituted in a circuit court in behalf of the North Missouri Railroad Company, under its charter, to obtain a condemnation of land upon which it had located its railroad, is a proceeding in which the court acts in its judicial capacity; an appeal will lie to the Supreme Court from the final judgment of the circuit court in such proceeding. *North Missouri Railroad Co. v. Lackland*, 515.
85. The North Missouri Railroad Company instituted proceedings under its charter to obtain a condemnation of land upon which its railroad was located; *held*, that said company might, at any time before final judgment in such proceeding, change the route of the railroad and dismiss the proceeding. *Ib.*
86. Where a railroad company, after having commenced proceedings for the condemnation of land upon which its railroad is located, exercises its right of dismissing the proceedings before the judgment of the court upon the report of the viewers or commissioners is rendered, the company should pay the costs and expenses growing out of the suit. *North Missouri Railroad Co. v. Reynal*, 584.
87. To authorize an appeal to the Supreme Court, final judgment should have been rendered in the court from whose decision the appeal is taken. *The State v. Shehane*, 565.
88. Instructions to a jury should be incorporated into a bill of exceptions; otherwise they will be disregarded by the Supreme Court. *Ib.*
89. Where an answer improperly blends and defectively states matters set forth therein as a defence and as a counter claim, the proper mode of taking advantage of the defect is, not by demurrer to the whole answer, but by motion to strike out either the whole of it or such portions as are defectively pleaded. *Kinney v. Miller*, 576.
90. Instructions, to become a part of record, must be incorporated into a bill of exceptions. *Johnson v. Dicken*, 580.
91. Where in a suit for slander—in which slanderous words against the plaintiff and also against the plaintiff's wife, who is not a party to the suit, are

PRACTICE—(*Continued.*)

- charged, and evidence is received upon both charges—the jury assess entire damages, it will be presumed that some part of the damages was assessed upon the count or cause of action for words spoken against the wife, although this count or cause of action may have been defective; in such case the judgment shall be arrested. *Ib.*
42. Where, during the pending of a motion for a new trial on the ground that the verdict is against the weight of evidence, a cause is removed to another circuit by an act of the legislature transferring the county in which the suit is pending to such other circuit, the judge of such other circuit should not decline disturbing the verdict, and refuse to grant a new trial, on the ground that the judge, not having heard the evidence as delivered by the witnesses on the stand, had not had the opportunity which the jury had of deciding upon the credibility of the witnesses. If embarrassed from such cause, the court should grant a new trial. *Woolfolk v. Tate*, 596.
43. A. sued B. and C. in a justice's court, and obtained judgment; execution issued and was returned "nulla bona" as to one of the defendants, but whether as to B. or C. did not appear; nor did it appear against which of said defendants said execution issued, nor whether it issued against both defendants. A transcript of said judgment was filed in the circuit court, and an execution was issued thereon, and real estate belonging to B. was sold at a sheriff's sale thereunder. *Held*, that the purchaser at sheriff's sale acquired no title. *Linderman v. Edson*, 106.
44. Where an action is commenced in a justice's court by process, it is not necessary that a confession of judgment should be in writing. *Franse v. Owens*, 329.
45. Where a defendant in a justice's court appears at the return day of process and confesses a judgment, and an entry of such confession is made upon the justice's docket, an execution may lawfully issue, although no entry is made upon the docket of a judgment upon the confession. *Ib.*

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

1. In the case of an indictment for murder the defendant is entitled to a panel of thirty-six jurors; also to have a list of such jurors delivered to him forty eight hours before the trial. The "Act to regulate and pay grand and petit jurors in Stoddard county," approved February 13, 1855, (Sess. Acts, 1855, p. 581,) does not in any way affect these rights. *The State v. Buckner*, 167.
2. The revised code of 1855 governs such proceedinga had after May 1st, 1856, although the indictment was pending previous to that date. (See *State v. Phillips & Ross*, 24 Mo. 475.) *Ib.*
3. If a regular panel of jurors be exhausted before a jury is obtained, the defendant is not entitled to have any particular number of by-standers or talesmen summoned from which to complete the jury. *Ib.*
4. Where an affidavit for a continuance is filed, the court should not permit it to be strengthened by other affidavits of the same person. *Ib.*
5. In the case of an indictment for murder it is error to receive a verdict of the jury in the absence of the defendant. He must be personally pre-

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES—(*Cont'd.*)

- sent, not only during the trial, but at the time of the rendition of the verdict. *Ib.*
6. One A. was put upon his trial for an alleged misdemeanor; after the evidence on both sides was closed, the court refused to submit the case to the jury as requested by A., and against objection on his part called the next case on the docket, being a case of misdemeanor, and empanneling the same jury heard the evidence in the same, and submitted both causes to the same jury at the same time. *Held*, that the court committed error. *The State v. Devlin*, 174.
 7. Where a petition of a defendant in a criminal prosecution for a change of venue sets forth one of the statutory grounds for such change, the order removing the cause will not be rendered null and void by reason of an omission to specify therein the cause of removal. *The State v. Worrell*, 205.
 8. Where a motion for a continuance on the ground of the absence of a material witness is overruled, the Supreme Court will not hold it to be error if it clearly appear that the testimony of the absent witness would not have affected the result. *Ib.*
 9. The provision contained in section 11 of article 2 of the act concerning costs, (R. C. 1855, p. 451,) that if the jury fail to declare, in the case of the acquittal of a person indicted, by whom the costs shall be paid—the prosecutor or the county—the court shall render judgment against the prosecutor for costs, is not applicable to cases in which persons had become prosecutors under the revised code of 1845. Where the indictment, with the prosecutor's name endorsed, was pending previous to the taking effect of the revised code of 1855, the tenth section of article 2 of the act concerning costs in the revised code of 1845 (R. C. 1845, p. 249) is applicable. *The State v. Berry*, 355.
 10. Where two are jointly indicted, and one only applies for a change of venue, an order removing the cause will be effectual only as to the one so applying; if a recognizance be in such case entered into by both to appear in the court to which the cause is removed, it will be void as to the one not applying for a change of venue. *The State v. Wetherford*, 489.
 11. The state is liable to pay costs in a criminal prosecution against a slave only in case the slave is convicted of a capital offence and is executed; an escape of the slave from custody or his execution by a mob, either before or after conviction, would not be sufficient to render the state liable for costs. *Calhoun v. Buffington*, 448.

PRESUMPTION OF GIFT.

1. Where a father sends home with his married daughter a slave, saying at the time that he had given the slave to her, it will not be presumed, as a matter of law, to be an absolute gift. *Beale's Adm'r v. Dale*, 301.

PRINCIPAL AND AGENT.

See SHIPPING.

1. A deed was executed in the following form: "This indenture, made and entered into this, &c., by and between A. B. and C. D., of, &c., of

PRINCIPAL AND AGENT—(Continued.)

the first part, and E. F., of, &c., of the second part, witnesseth, &c. In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day, &c. [Signed] G. H. (seal), I. J. (seal), attorneys for A. B. and C. D." Held, to be the deed of the principals, A. B. and C. D. *Martin v. Almond*, 818.

PROBATE COURT.

1. The probate court of Ray county has jurisdiction to entertain a motion for an order directing an executor to pay specific legacies. (*Sess. Acts, 1858*, p. 390.) *Darneal v. Reeves' Exec'r*, 295.

PROMISSORY NOTES.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

PUBLIC USE.

See **CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES.**

PURCHASER.

See **VENDOR AND PURCHASER.**

Q**QUO WARRANTO.**

1. A writ of *quo warranto* is a writ of right, and issues as a matter of course upon demand of the proper officer. *The State, on Relation of Washington County, v. Stone*, 565.

R**RAPE.**

See **CRIMES AND PUNISHMENTS**, 12.

RAILROAD.

See **CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES. CONSTITUTIONAL LAW. CORPORATION.**

RAY COUNTY.

See **PROBATE COURT.**

RECOUPMENT.

1. In an action for the price of slaves sold, the defendant may recoup the damages sustained by him by reason of a breach of warranty of the slaves. *Nelson v. Johnson*, 480.

REDUCTION INTO POSSESSION.

See **CHASE IN ACTION.**

REFERENCE.

See **PRACTICE**, 27.

RENT.

See **LANDLORD AND TENANT. HUSBAND AND WIFE.**

REVISED CODE, 1855.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 2. COSTS, 1.
STATE v. SHEHANE, 565.

S

ST. LOUIS, CITY OF.

1. The City of St. Louis has power under its charter (see Rev. Ord. 1856, p. 188, 518,) to provide by ordinance that "no person, not being the lessee of a butcher's stall, shall sell, or offer for sale, in market or in any other place, any fresh meat in less quantities than one quarter." *City of St. Louis v. Jackson*, 87.
2. The second section of the act of February 28, 1853, amendatory of the charter of St. Louis of March 8, 1851, is constitutional in so far as it required that in paying the value of land taken for the opening, widening or altering of a lane, alley, street, &c., the city should pay the value to the public generally of the proposed improvement, and that the balance should be assessed "against the owner or owners of the property fronting on such lane, alley, street, avenue, wharf or square, and in the blocks next adjacent, on either side or end thereof, according to the value of the property so assessed and in the proportion that the owners thereof may be respectively benefited by the proposed improvement." *Garrett v. City of St. Louis*, 505.
3. Such assessments against adjacent owners in respect of the benefits received by them from the opening, widening or altering a street, &c., are a constitutional exercise of the taxing power. *Ib.*

SALE.

See GUARDIAN'S SALE.

1. Five hogsheads of sugar lying on the wharf of St. Louis were purchased by sample; held, that a delivery to the purchaser of the city weigher's certificate and a bill of the price constituted a sufficient delivery of the sugar. *Glasgow v. Nicholson*, 29.

SCHOOL TAX.

1. In order that a constable may, under section 2 of article 7 of the act to provide for the organization, support and government of common schools, (Sess. Acts, 1853, p. 159, and R. C. 1855, p. 1439,) lawfully levy upon a delinquent's goods and chattels, he must first demand the payment of the assessment. *Atkison v. Amick*, 404.

SCIRE FACIAS.

See MECHANICS' LIEN.

SERVICE OF PROCESS.

See SHERIFF'S RETURN.

SHERIFF'S RETURN.

1. The fact that the return of service of process is defective is no ground for dismissing a suit. *Phillebart v. Evans*, 323.

SHERIFF'S RETURN—(Continued.)

2. A defendant who appears and files an answer to a petition will be precluded from taking advantage of a defect in the return of service of process upon himself. *Ib.*
3. A sheriff made the following return of service of process: "I do hereby certify that I served the within petition and writ on the within named A. B. by delivering a copy to the wife of the said A. B., over sixteen years of age, on this," &c. *Held*, that the return was defective in that it did not appear that the copy was delivered at the usual place of abode of the defendant. *Smith's Adm'r v. Rollins*, 408.

SHERIFF'S SALE.

1. A. sued B. and C. in a justice's court, and obtained judgment; execution issued and was returned "nulla bona" as to one of the defendants, but whether as to B. or C. did not appear; nor did it appear against which of said defendants said execution issued, nor whether it issued against both defendants. A transcript of said judgment was filed in the Circuit Court, and an execution was issued thereon, and real estate belonging to B. was sold at a sheriff's sale thereunder. *Held*, that the purchaser at sheriff's sale acquired no title. *Linderman v. Edson*, 105.
2. Where a purchaser at a sheriff's sale practices any deceit or imposture, or is guilty of any trick or device, the object of which is to get the property at an under value, the sale may be set aside in favor of the defendant in the execution. *Stewart v. Nelson*, 309.

SHIPPING.

1. The custom or usage authorizing those engaged in the transportation of merchandise to advance to forwarding agents the existing charges thereon, and to hold the consignees and owners liable therefor, does not extend to or cover advances made on demands upon the consignees or owners wholly foreign to, and disconnected with, any cost or charge for transportation. *Steamboat Virginia v. Kraft*, 76.
2. A master of a vessel, as such, has power to bind the owners for necessities and repairs only: the burden of proving the necessity lies upon the creditor. *Clark v. Humphreys*, 99.
3. A custom or usage of trade, to be valid and binding, must be reasonable. *Ib.*
4. A custom or usage among masters and clerks of steamboats for the master to draw bills of exchange upon the clerk, and negotiate the same, is an unreasonable custom and can not be invoked to fix a liability upon the owners to the parties to whom such bills of exchange may be transferred. *Ib.*

SLANDER.

1. Words charging a person with stealing in a sister state are actionable *per se*. *Johnson v. Dicken*, 580.
2. In a suit for slanderous words spoken of a wife, she should be joined with her husband as a party to the suit; the husband alone could not recover unless he avers and proves special damage. *Ib.*
3. Where in a suit for slander—in which slanderous words against the

SLANDER—(Continued.)

plaintiff and also against the plaintiff's wife, who is not a party to the suit, are charged, and evidence is received upon both charges—the jury assess entire damages, it will be presumed that some part of the damages was assessed upon the count or cause of action for words spoken against the wife, although this count or cause of action may have been defective; in such case the judgment shall be arrested. *Ib.*

SLAVERY.

See **FREEDOM.**

1. If a slave give a watch to his wife, who is owned by another master, a third person, who obtains possession of the watch wrongfully, will not be permitted to deny the validity of the transfer in a suit brought against him by the owner of the wife, to recover its value—the owner of the husband not objecting to the disposition made by his slave of the watch. *Folden v. Hendrick*, 411.

STATUTE OF FRAUDS.

1. The possession that will be deemed such a part performance of a parol contract for the sale of land as will take the case out of the statute of frauds is an actual possession taken by the vendee under the contract, with the consent of the vendor, and with a view to the performance of the contract, and not the constructive possession which the law imputes to the owner when there is no actual adverse possession in a stranger. *Charpiot v. Sigerson*, 68.
2. In order to take case out of the statute of frauds on the ground of a part performance of a parol contract for the sale of land, the acts relied on should be definite and referable exclusively to the contract, and the contract itself should be fully established in all its essential terms. *Ib.*

SUIT FOR FREEDOM.

See **FREEDOM.**

SUPREME COURT.

See **PRACTICE**, 4, 5, 19, 23, 30, 31.

SURVEY.

See **LANDS AND LAND TITLES.**

T**TALESMEN.**

See **PRACTICE AND PROCEEDINGS IN CRIMINAL CASES**, 3.

TAX.

See **SCHOOL TAX.**

TAXING POWER.

See **CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES.**

TENANCY BY CURTESY.

See **CURTESY.**

TREBLE DAMAGES.

See **DAMAGES**, 2.

TRESPASS.

1. The Hannibal and St. Joseph Railroad Company entered—under the second section of the “act to amend an act entitled ‘an act to incorporate the Hannibal and St. Joseph Railroad Company,’” approved February 28, 1868, (Sess. Acts, 1868, p. 321,)—upon the land of plaintiff and cut timber for the construction of their railroad; *held*, that the plaintiff was not entitled to treble damages under the “act to prevent certain trespasses.” (R. C. 1845, p. 1068.) *Lindell v. Hannibal and St. Joseph Railroad Co.*, 550.

TRUST.

See **EQUITY**. **HUSBAND AND WIFE**, 4. **LANDS AND LAND TITLES**, 10.

1. One of several *cestuis que trust* can not single out a portion of the trust property and allege an exclusive right thereto, and assert that right in an action for its possession. *Edwards v. Welton*, 378.
2. Where trust funds are misappropriated, the *cestui que trust* may follow the property acquired therewith, and assert the trust as against any one taking with notice. *Ib.*

TRUSTEE.

See **PALMYRA**.

1. The appointment of trustees may be proven by parol evidence, where it does not appear that the evidence of the appointment is in writing. *Gilbert v. Boyd*, 27.

U**USAGE OF TRADE.**

See **CUSTOM**.

V**VENDOR AND PURCHASER.**

See **SHERIFF'S SALE**.

1. Where a purchaser of land accepts from his vendor a conveyance with full warranty of title, there being no fraud in the sale, and the possession of the purchaser remaining undisturbed, he can not be relieved against the payment of the purchase money on the mere ground of a defect of title. *Connor v. Eddy*, 72.
2. Where a purchaser of land executes a deed of trust, with warranty of title, to secure to the vendor the payment of the purchase money, he is not estopped by his warranty to avail himself of any relief to which he would otherwise be entitled by virtue of the vendor's covenants to himself. *Ib.*
3. To constitute a person a *bona fide* purchaser for value without notice within the rule that protects such a purchaser the purchase money should be paid before notice is received. *Paul v. Fulton*, 156.

VENDOR AND PURCHASER—(Continued.)

4. Possession of real property under an unrecorded deed, though brought home to a subsequent purchaser, does not constitute, as a matter of law, actual notice of such prior deed within the meaning of our registry act. *Vaughn v. Tracy*, 818.
5. Possession and apparent ownership are, however, facts from which a jury will be warranted in inferring actual notice. *Ib.*
6. Where the evidence relied on to bring home to a subsequent purchaser actual notice of a prior unrecorded deed is a declaration of such subsequent purchaser to the effect that his grantor had told him before his purchase that the plaintiff (the prior purchaser) "had a mill on the land and would have to move it away now," it is error to instruct the jury that "if the plaintiff was on the acre of land and mill thereon at the time of the defendant's purchase, and that fact was then known to defendant, it was a sufficient notice in law of the plaintiff's previous purchase so as to affect the defendant with notice of the plaintiff's title." *Ib.*
7. In an action for the price of slaves sold, the defendant may recoup the damages sustained by him by reason of a breach of warranty of the slaves. *Nelson v. Johnson*, 480,

VENUE.

See CHANGE OF VENUE.

W

WARRANTY.

See VENDOR AND PURCHASER, 1, 2, 7.

1. In partition sales, in statutory proceedings for partition, there is no warranty of title. *Schwartz v. Dryden*, 572.

WILL.

1. A will, after a devise to the wife of the testator of all his property, contained the following clause: "In every other respect I leave it entirely to the will and judgment of my said wife Catherine, how and in what manner she thinks proper to dispose of the estate, as well with reference to our child or children as with reference to the said Joseph Frederick Beck." The testator left one child him surviving. *Held*, such child was named in said will within section 11 of the act concerning wills; (R. C. 1845, p. 1080;) that consequently the testator did not die intestate as to such child. *Beck v. Metz*, 70.

WITNESS.

See EVIDENCE, 20.

1. The widow of a testator is a competent witness, in a suit upon the bond of the executor of the will of such testator, to prove the receipt by the executor of money belonging to the estate that had not been inventoried or accounted for. *Sherwood's Adm'r v. Hill*, 891.
2. To entitle a party to a suit, under the eleventh section of the twenty-fourth article of the practice act of 1849, or the third section of the act concerning witnesses (R. C. 1855, p. 1577), to examine as a witness in

WITNESS—(*Continued.*)

his behalf a party to the suit, the party summoned must be an *adverse* party, and not merely an opposing party on the record. *Harris v. Harris*, 567.

WRIT OF ERROR.

1. A writ of error will be dismissed for the reason that it is left blank as to the names of the parties to the suit. *Fremon v. City of Coronadolet*, 62.
2. No amendment of such writ can be allowed in the Supreme Court. *Ib.*
3. The first judgment in an action for partition is interlocutory; a writ of error will not lie thereto. *Stephens v. Hume*, 349.

WRIT OF QUO WARRANTO.

1. A writ of *quo warranto* is a writ of right, and issues as a matter of course upon demand of the proper officer. *The State, on Relation of Washington County, v. Stone*, 555.

E. E. J. M.

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